No. 83-1007-CFX
Status: GRANTED

Title: Tiffany Fine Arts, Inc., et al., Petitioners
v.
United States, et al.

Docketed:
December 19, 1983

Court: United States Court of Appeals
for the Second Circuit

Counsel for petitioner: Savage, Michael D.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Dec 19 1983	G	Petition for writ of certiorari filed.
3	Jan 18 1984		Order extending time to file response to petition until February 19, 1984.
4	Feb 22 1984		DISTRIBUTED. March 16, 1984
5	Feb 21 1984	X	Brief of respondents United States, et al. in opposition filed.
7	Mar 19 1984		REDISTRIBUTED. March 23, 1984
9	Mar 26 1984		REDISTRIBUTED. March 30, 1984
10	Apr 2 1984		Petition GRANTED.
			**********
12	Apr 23 1984		Order extending time to file brief of petitioner on the merits until June 18, 1984.
13	Jun 18 1984		Brief of petitioner Tiffany Fine Arts, et al. filed.
14	Jun 18 1984		Joint appendix filed.
15	Jun 18 1984		Brief amicus curiae of First Western Government Securities, Inc., et al. filed.
18	Jun 26 1984		Record filed.
19	Jun 26 1984		Certified original record & C.A. proceedings received.
21	Jul 18 1984		Order extending time to file brief of respondent on the merits until August 17, 1984.
22	Aug 17 1984	X	Brief of respondent United States filed.
23	Aug 28 1984		CIRCULATED.
24	Aug 28 1984		SET FOR ARGUMENT. Wednesday, October 31, 1984. (4th case)
25	Oct 31 1984		ARGUED.

83-1007

FILED
DEC 19 1983
ALEXANDER L. STEVAS,
CLERK

No.

IN THE

Supreme Court of the United States

October Term, 1983

TIFFANY FINE ARTS, INC., *et al*

Petitioners,

–v–

UNITED STATES OF AMERICA, *et al*

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners* respectfully pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit, which sustained an order of the United States District Court for the Southern District of New York directing the enforcement of various Internal Revenue Service summonses served on petitioners.

QUESTIONS PRESENTED

(1) Whether an Internal Revenue Service general summons, issued under 26 U.S.C. §§ 7602 and 7604, which is served on a recordkeeper before an audit of the recordkeeper begins in substance and which seeks the identities of unnamed taxpayers, must comply with the provisions of 26 U.S.C. § 7609(f) regarding John Doe summonses, particularly when

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* Petitioners include Tiffany Fine Arts, Inc. and its wholly-owned subsidiaries, World Medical Marketing Corp. and World Video Corp.

the Service has enunciated an institutional purpose to audit such unnamed taxpayers.

(2) Whether a recordkeeper served with such a summons is entitled to an evidentiary hearing to determine if a John Doe summons subject to the provisions of 26 U.S.C. § 7609(f) is masquerading as a general summons.

PARTIES

The parties in this case are Petitioners-Appellants Tiffany Fine Arts, Inc., and its wholly-owned subsidiaries, World Video Corp. and World Medical Marketing Corp. and Respondents-Appellees the Internal Revenue Service by a Revenue Agent, Joel Lewis, and the United States of America.

TABLE OF CONTENTS

	Page
Table of Authorities	iv
Reports of Opinions	1
Jurisdiction	1
Statutes Involved	1
Statement of the Case	4
Argument	8
In general	8
Statutory framework	8
The split in the circuits	9
The abuse of the courts' process	11
Threats to rights of privacy	13
Conclusion	15
Appendix A	A-1
Appendix B	A-13
Appendix C	A-14

TABLE OF AUTHORITIES

	Page
Cases:	
Barter Systems, Inc., United States, 694 F.2d 163 (8th Cir. 1982).	10, 11
Bisceglia, United States v., 420 U.S. 141, 95 S. Ct. 915 (1975).	12
Gottlieb, United States v., 712 F.2d 1363 (11th Cir. 1983)	11
Thompson, United States v., 701 F.2d 1175 (6th Cir. 1983)	9, 10, 12
Statutes:	
Section 7602(a) of the Internal Revenue Code of 1954, as amended, 26 U.S.C. § 7602(a)	1, 6, 8
Section 7604 of the Internal Revenue Code of 1954, as amended, 26 U.S.C. § 7604	2, 5
Section 7609(c) and (f) of the Internal Revenue Code of 1954, as amended, 26 U.S.C. § 7609(c) and (f)	3, 4, 8
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1331	7
Other Authorities:	
General Explanation of the Tax Reform Act of 1976, Prepared by the Staff of the Joint Committee on Taxation, December 29, 1976, (Reproduced in 1976-3 (Vol. 2) Cum. Bull.).	12, 13, 14
Internal Revenue Manual (IRM) 42(17), Exhibit 42(17)0-1.	10

REPORTS OF OPINIONS

The opinion of the Second Circuit Court of Appeals in this case is reported at 718 F.2d 7 and is set forth in Appendix A.

The order of the United States District Court for the Southern District of New York was not accompanied by an opinion.

JURISDICTION

The decision sought to be reviewed herein was entered by the United States Court of Appeals for the Second Circuit on September 13, 1983. An order denying a rehearing was entered by the Court of Appeals on October 28, 1983. That order is set forth in Appendix B. An order granting a stay of the mandate of the Court of Appeals to permit petitioner to petition this Court for a writ of certiorari was entered on November 21, 1983. That order is set forth in Appendix C.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The following statutes are involved in this case:

26 U.S.C. (Internal Revenue Code of 1954, as amended) § 7602(a):

> AUTHORITY TO SUMMON, ETC. For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized—
>
> > (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

26 U.S.C. § 7604:

(a) JURISDICTION OF DISTRICT COURT—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) ENFORCEMENT—Whenever any person summoned under section 6420(e)(2), 6421(f)(2), 6427(h)(2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the

case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

26 U.S.C. § 7609(c):

(1) IN GENERAL—Except as provided in paragraph (2), a summons is described in this subsection if it is issued under paragraph (2) of section 7602 or under section 6420(e)(2), 6421(f)(2), or 6427(b)(2) and requires the production of records.

(2) EXCEPTIONS—A summons shall not be treated as described in this subsection if—

(A) it is solely to determine the identity of any person having a numbered account (or similar arrangement) with a bank or other institution described in subsection(a)(3)(A), or

(B) it is in aid of the collection of—

(i) the liability of any person against whom an assessment has been made or judgment rendered, or

(ii) the liability at law or in equity of any transferee or fiduciary of any person referred to in clause (i).

(3) RECORDS, CERTAIN RELATED TESTIMONY—For Purposes of This Section—

(A) the term "records" includes books, papers, or other data, and

(B) a summons requiring the giving of testimony relating to records shall be treated as a summons requiring the production of such records.

26 U.S.C. § 7609(f):

ADDITIONAL REQUIREMENT IN THE CASE OF A JOHN DOE SUMMONS—Any summons described in subsection (c) which does not identify the person with respect to whose liability the summons is issued may be served only after a court proceeding in which the Secretary establishes that—

(1) the summons relates to the investigation of a particular person or ascertainable group or class of persons,

(2) there is a reasonable basis for believing that such person or group or class of persons may fail or may have failed to comply with any provision of any internal revenue law, and

(3) the information sought to be obtained from the examination of the records (and the identity of the person or persons with respect to whose liability the summons is issued) is not readily available from other sources.

STATEMENT OF THE CASE

Petitioners (hereinafter collectively, "Tiffany") sell products to investors on a tax-favored basis. During 1979 and 1980 Tiffany, through one of its subsidiaries, sold approximately 50 to 100 distributorships to various persons to promote the sale of one of Tiffany's products (a medical device called a "Pedi-Pulsor") in their licensed territories. Under the structure of the licensing program, licensees received tax benefits for the years 1979 and 1980.

From the start, the Internal Revenue Service's interest in Tiffany has been to determine the identities of its licensees on the theory that they were tax shelter investors. Sometime in the summer of 1981, Revenue Agent Joel Lewis ("Agent Lewis") visited the premises of Tiffany and requested the names, addresses and social security numbers of all Pedi-Pulsor licensees. Agent Lewis did not request the standard financial

information which is necessary to conduct any legitimate taxpayer audit. Agent Lewis was referred to Tiffany's attorney where he repeated his request for customer identities, which was denied.[1]

No further contact with Agent Lewis occurred until October 6, 1981, when Tiffany was served with four Internal Revenue Service ("IRS" or "Service") administrative summonses. Each summons requested all books, papers, records and other data pertaining to Tiffany's operations. Each summons also sought the names, addresses and taxpayer identification numbers of Tiffany customers who had purchased Pedi-Pulsor distributorships. Two summonses sought the identities of Tiffany customers who had purchased "lithographs" (Tiffany did not sell lithographs). These two summonses also sought the identities of Tiffany customers who had purchased any other asset from Tiffany. These summonses were served under 26 U.S.C. § 7602.

Tiffany declined to comply with the summonses on the ground that they was not served pursuant to a legitimate purpose. On November 9, 1982, the United States filed an action in the United States District Court for the Southern District of New York to enforce the summonses pursuant to 26 U.S.C. § 7604(a). The government's petition was accompanied by an affidavit of Agent Lewis which stated that he was "conducting an investigation, *one purpose of which* is to ascertain the correctness of" Tiffany's consolidated tax return. (Emphasis supplied.) Agent Lewis did not elaborate on the other purposes of the summonses, and Tiffany never had the opportunity to ask him.

Tiffany filed a memorandum of law, and appeared in Court on November 24, 1982, to show cause why the summonses should not be enforced. It filed an affidavit by Tiffany's chief operating officer, Dr. Stephen R. Hofstein, which stated

[1] Agent Lewis stated in an affidavit that he made an appointment with Tiffany's accountant in July of 1980, which was cancelled by the accountant, and that he visited Tiffany's attorney in August, 1981.

that, based on the events which had transpired, it appeared that the IRS was primarily interested in obtaining a list of Tiffany's customers, not in auditing Tiffany's tax return. Tiffany pointed out that it was the institutional posture of the IRS to obtain lists of investors from "tax shelter promoters" and forward them to the appropriate district offices, especially in the case of "lithograph programs". And although Tiffany did not sell lithographs, the IRS apparently did not realize that.

Tiffany objected to enforcement of each summons on the ground that it was essentially a "John Doe" summons which should have been served only after the IRS had complied with the requirements of 26 U.S.C. § 7609(f) (hereinafter "Section 7609(f)") governing the service of John Doe summonses. Tiffany argued that the IRS should not be permitted to avoid the requirements of Section 7609(f) by cloaking what was essentially a John Doe summons in the guise of a general summons which is served under 26 U.S.C. § 7602 and is not subject to any special requirements.

In its memorandum of law, and in oral argument, Tiffany requested the Court to limit the scope of each summons so that the identities of its customers would not have to be revealed. (Tiffany was willing to deliver the balance of its records to the IRS.) In the alternative, Tiffany requested the Court to conduct a hearing to determine whether the IRS was, in fact, serving what was essentially a John Doe summons subject to the requirements of Section 7609(f).

The District Court, from the bench, rejected Tiffany's request for a hearing and ordered the summonses enforced in full. Eventually it stayed its order pending appeal.

On appeal to the Court of Appeals for the Second Circuit, the Appeals Court affirmed the District Court. The Court, per Judge Pratt, described the "central issue" as follows: "whether an IRS summons issued under [26 U.S.C.] § 7602 in connection with the investigation of a named taxpayer, which might also facilitate the investigation of unnamed taxpayers, is

subject to the requirements of § 7609(f)."[2] The Second Circuit, recognizing a split in the circuits on the issue of so-called "dual purpose" summonses, held that the summons was legitimate as long as the recordkeeper was named in the summons as an audit target. The Court further held that the District Court had not abused its discretion in denying Tiffany a hearing to determine the true intent of the IRS since, in the Court's view, the dual purpose character of the summons did not require the Service to resort to the enforcement procedures provided in Section 7609(f).[3]

Following a request for a rehearing, which was denied, Tiffany petitioned this Court for a writ of certiorari to reconcile not only the conflict among the various Courts of Appeals on the interpretation of Section 7609(f) but also the conflict presented by that statute between taxpayers' privacy rights and the Service's rights to conduct its investigations.

The statutory basis for federal jurisdiction in the United States District Court is 28 U.S.C. § 1331.

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[2] Tiffany does not agree that this description is a proper statement of the "central issue". The "central issue" is whether the IRS may resort to a summons under 26 U.S.C. §§ 7602 and 7604, thereby evading the procedures of Section 7609(f), where its primary purpose—and, possibly, its predominant purpose—is to identify unnamed taxpayers, particularly where the IRS has enunciated a policy of auditing such taxpayers.

[3] Tiffany does not concede that the summons served on it was a "dual purpose" summons because, in its view, the summons may have been intended to serve only one purpose—learning the identities of Tiffany's clients. Tiffany would have attempted to demonstrate that had it been granted an evidentiary hearing.

ARGUMENT

In general.

This case is ripe for Supreme Court review to resolve a sharp and growing split in the Circuit Courts of Appeals on the interpretation of an important Federal statute relating to the circumvention by the Internal Revenue Service of the administrative procedures intended to govern the use of John Doe summonses. The statutory framework in question has a substantial impact on the power of the IRS to gather information and on the rights of citizens to be protected from unwarranted government intrusion on their privacy. It also creates an opportunity for potentially serious abuse of the courts' process in enforcing IRS summonses. The Circuit Courts of Appeals are interpreting the same statute, and the same legislative history, in a directly conflicting manner. This Court has yet to rule on the issues presented by this case, and its guidance is required to resolve an admittedly difficult question on the interpretation of a statute which has a direct and meaningful impact on a significant segment of the public.

Statutory framework.

The Internal Revenue Code of 1954 (26 U.S.C., hereinafter "Code") Section 7602 authorizes the IRS to examine the books and records of any person in connection with an investigation of the tax liability of any other person. However, Code Section 7609 imposes certain limitations on the use of this authority. Under Section 7609(f), an IRS summons "which does not identify the person with respect to whose liability the summons is issued" may be served only after the IRS has demonstrated to a court that it has met the requirements of Section 7609(f).[4]

[4] These requirements are: (1) that the summons relates to the investigation of a particular person or ascertainable group of persons; (2) that there is a reasonable basis to believe that such persons may have improperly avoided tax; and (3) that the information sought by the IRS cannot readily be obtained elsewhere. The IRS establishes that it has met these requirements in an ex parte proceeding in a Federal District Court under Code Section 7609(h).

The split in the circuits.

The Circuit Courts of Appeals disagree on the applicability of Section 7609(f) to a summons which primarily seeks the identities of unnamed taxpayers but which does name as an audit target the party served with the summons. The Courts of Appeals disagree on when a summons "does not identify the person with respect to whose liability the summons is issued" so that it becomes subject to Section 7609(f). The Sixth Circuit has ruled that, if a summons seeks information about a taxpayer who is not identified in the summons, it is subject to Section 7609(f). The Eighth and Eleventh Circuits, and the Second Circuit in this case, have held that Section 7609(f) does not apply, regardless of how many unidentified taxpayers are targets of the summons, as long as the recordkeeper itself is under audit.

In *United States v. Thompson,* 701 F.2d 1175 (6th Cir. 1983), the IRS, as part of its program to investigate the activities of organized barter exchanges, initiated an audit of Barter Exchange of Nashville, a partnership. During the audit, the IRS served a general summons under Code Section 7602, requesting documents of the partnership which identified the partnership's clients — those people for whom the partnership served as a clearinghouse for the bartering of goods and services. The partnership declined to provide this information on the ground that the summons did not identify the persons with respect to whose tax liability it was issued and that, accordingly, the IRS had to first meet the requirements of Section 7609(f).

The IRS argued that its "primary purpose" in seeking the contested information was to audit the partnership. It conceded that the names of the members of the exchange which it obtained would be used to determine whether, and how many, audits of the exchange members would be conducted, but it maintained that such use of the names was a "secondary purpose".

The Sixth Circuit noted that, based on the testimony of the IRS agent involved, it was undisputed that one purpose of the summons was to identify and audit the members of the exchange. The Sixth Circuit further noted that it was the institutional posture of the IRS to identify and audit barter exchange members. Under these circumstances, the Court ruled, the literal language of the Code triggered the operation of Section 7609(f), whatever the IRS's primary purpose may have been. The summons had identified the partnership, but not its clients, and since it was issued at least in part with respect to their tax liabilities, it was covered by Section 7609(f). Since the IRS had not complied with Section 7609(f), enforcement of the summons was denied.

The Sixth Circuit's decision in *Thompson* was directly contrary to a previous decision by the Eighth Circuit Court of Appeals in *United States v. Barter Systems, Inc.*, 694 F.2d 163 (8th Cir. 1982). *Barter Systems* also involved an IRS audit of a barter exchange and a general summons, issued under Code Section 7602, seeking the identities of its members. The Eighth Circuit reasoned that the summons was not a "John Doe" summons because it identified the barter exchange.

In the proceeding before this Court, the Second Circuit Court of Appeals followed the mechanistic logic of the Eighth Circuit. It ruled that the summons served on Tiffany was not a John Doe summons because it identified Tiffany, even though a primary purpose of the summons may have been to identify unnamed taxpayers and even though the Service, as an institution, has targeted lithograph investors for identification and audit (see Internal Revenue Manual IRM 42 (17), Exhibit 42(17)0-1). Therefore, Section 7609(f) did not apply.[5]

The Sixth Circuit, in *Thompson*, noted that the legislative history of Section 7609(f) was totally consistent with the

[5] It should be noted that the audits in *Thompson* and *Barter Systems* had proceeded considerably further than the audit in this case, and that the summonses in those cases were more appropriately labled as "dual purpose" summonses.

statutory language and "compelled" the application given to that language by the Sixth Circuit. 701 F.2d at 1180. The Eighth Circuit, in *Barter Systems*, stated that nothing in the legislative history suggested that Congress intended that Section 7609(f) apply to dual purpose summonses. 694 F.2d at 168.

In another dual purpose summons case, *United States v. Gottlieb*, 712 F.2d 1363 (11th Cir., 1983), the Eleventh Circuit also sided with the Eighth Circuit. In the Eleventh Circuit's view, the Congress was "silent" on the issue of whether Section 7609(f) applied in the case of a dual purpose summons. It based its decision principally on the "deferential standard which must be applied when construing congressional intent regarding the scope of the IRS's summons authority." 712 F.2d at 1369.

In *Barter Systems* and *Gottlieb*, the Courts of Appeals reversed lower court decisions that held that Section 7609(f) applied. Thompson was a reversal of a lower court decision that held that Section 7609(f) did not apply.

It is clear that the circuits are split on the issue of when a summons identifies the person with respect to whose tax liability it was issued, that the Service's information-gathering power is consequently greater in the Second, Eighth and Eleventh Circuits than in the Sixth Circuit, and that the privacy rights of citizens in the former circuits are consequently accorded less protection than in the latter circuits. Given the importance of the statute which is being interpreted in a directly conflicting manner, it is submitted that certiorari should be granted on this ground alone.

The abuse of the courts' process.

One aspect of the dual purpose summons problem which has not been addressed by any of the circuit courts involves the potential abuse of the courts' process in the enforcement of such summonses. The legislative history of Section 7609(f) makes one point indisputably clear: Congress enacted Section 7609(f) to curb the potential abuse of the John Doe summons process

after this Court's decision in *United States v. Bisceglia*, 420 U.S. 141, 95 S.Ct. 915 (1975). In *Bisceglia*, this Court upheld the use of the John Doe summons as long as the IRS was not engaged in a fishing expedition. Congress enacted Section 7609(f) so that a court would supervise the Service's use of John Doe summonses. See *General Explanation of the Tax Reform Act of 1976*, Prepared by the Staff of the Joint Committee on Taxation, December 29, 1976, at 364-69 (reproduced in 1976-3 (Vol. 2) Cum. Bull. 376-82).

As a practical matter, any time that the IRS wants to obtain client lists, under *Barter Systems*, *Gottlieb* and the Second Circuit's decision in this case, it can avoid the requirements of Section 7609(f) merely by initiating an audit of a recordkeeper such as Tiffany, however specious or superficial the audit may be. When it then serves a general summons requesting client lists and asks the court to enforce that summons, it enlists the aid of the court's process. If the only true reason for initiating the audit was to avoid the Section 7609(f) requirements, the IRS abuses the court's process when it asks it to enforce a summons which is designed to circumvent the Section 7609(f) rules. Surely the courts have the power to inquire into the exact nature of the IRS's purpose. *Thompson* did not address this issue directly, but its holding, which looks to the purpose of the summons, permits the court to prevent its process from being abused in this manner.

The case before the Court invites the Service to circumvent the procedures of Section 7609(f) by simply identifying the recordkeeper as an audit target. Tiffany alleges, without contradiction, that Agent Lewis initially asked for Tiffany's client list without even advising Tiffany that it was under audit. Even if Agent Lewis had advised Tiffany that it was under audit, he requested Tiffany's client list at the very beginning of an audit—before he had requested or looked at any of Tiffany's books and records. In fact, at that time Agent Lewis knew so little about the company that he incorrectly thought that it sold lithographs. One has to wonder how Agent Lewis knew he would need Tiffany's client list in order to audit Tiffany before

he knew anything else about Tiffany except that it licensed Pedi-Pulsors.

Was Agent Lewis skirting the Section 7609(f) requirements? The possibility exists—and at least a hearing on that issue would have assisted the court in assuring that its process was not being abused. The Second Circuit ruled that a hearing was not required because, as long as Tiffany was under audit, the other purposes of the IRS, no matter how significant in motivating the Service, were immaterial. But Tiffany could have been placed "under audit" at any time, and the Second Circuit's position fails to provide the protection needed to prevent abuse of the court's process in the enforcement of an IRS summons. The potential for abuse of a Federal Court's process by itself merits this Court's review.

Threats to rights of privacy.

The decision below creates a substantial threat to taxpayers' rights of privacy which Congress specifically sought to protect. It was privacy rights that Congress was concerned about when it enacted Section 7609(f). In explaining the provision, the Staff of the Joint Committee on Taxation wrote:

> Reasons for change
>
> The use of the administrative summons, including the third-party summons, is a necessary tool for the IRS in conducting many legitimate investigations concerning the proper determination of tax. The administration of the tax laws requires that the Service be entitled to obtain records, etc., without an advance showing of probable cause or other standards which usually are involved in the issuance of a search warrant. On the other hand, the use of this important investigative tool should not unreasonably infringe on the civil rights of taxpayers, including the *right to privacy*.

Even prior to the enactment of this provision, the Service has instituted an administrative policy designed to

establish certain safeguards in this area. Under this policy, IRS representatives were instructed to obtain information from taxpayers and third parties on a voluntary basis where possible. Where a third-party summons is served, advance supervisory approval was required. In the case of a John Doe summons, the advance supervisory approval was required to be obtained on a high level basis. The Congress decided, however, that these administrative changes, while commendable, do not fully provide all of the safeguards which might be desirable in terms of protecting the *right of privacy.*

General Explanation of the Tax Reform Act of 1976, supra, at 364-65 (reproduced at 1976-3 Cum. Bull. (Vol. 2) at 376-77). [Emphases supplied.]

By circumventing the procedures of Section 7609(f), the dual purpose summons clearly infringes on privacy rights which Congress intended to protect when it enacted Section 7609(f). The issues are whether (1) Congress intended to protect these rights even in the case of a dual purpose summons and whether (2) at the least Congress expected the courts to monitor dual purpose summonses to assure that the provisions designed to guard those rights were not being circumvented improperly.

The cases cited in this petition suggest that the IRS is using dual purpose summonses with considerable frequency, and that the rights of a substantial number of people are involved. It is not often that Congress imposes limitations on the IRS's information-gathering authority. The fact that it did so in Section 7609(f) indicates that Congress considered the privacy rights at stake to be of the utmost importance. The possibility that the integrity of those rights is being compromised by the dual purpose summons also warrants this Court's review of the use of such summonses.

CONCLUSION

For the foregoing reasons, this petition should be granted and a writ of certiorari should be issued to review the decision below.

Respectfully submitted,

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Appendix A

UNITED STATES and Joel Lewis, Revenue Agent, Internal Revenue Service, Petitioners-Appellees,

v.

TIFFANY FINE ARTS, INC. and its subsidiaries, including World Medical Marketing Corporation and World Video Corp., Respondents-Appellants.

No. 1006, Docket 82-6336.

United States Court of Appeals,
Second Circuit.

Argued March 28, 1983.
Decided Sept. 13, 1983.

Before KEARSE, PIERCE and PRATT, Circuit Judges.

GEORGE C. PRATT, Circuit Judge:

Tiffany Fine Arts, Inc. and two subsidiaries, World Medical Marketing Corp. and World Video Corp. (collectively referred to as Tiffany) appeal from an order of the District Court for the Southern District of New York (Vincent L. Broderick, *Judge*), enforcing four Internal Revenue Service administrative summonses. Tiffany's principal contention on appeal is that before issuing the summonses the IRS was required to comply with the "John Doe" provisions of 26 U.S.C. § 7609(f)(1976). In addition, Tiffany argues that Judge Broderick abused his discretion by refusing to hold a hearing regarding the purpose underlying the summonses.

We affirm.

BACKGROUND

Tiffany Fine Arts, Inc. is a holding company for various subsidiaries engaged in promoting tax shelters. Sometime before August 28, 1981, IRS revenue agent, Joel Lewis asked Tiffany for a list of names, addresses, and social security numbers of the licensees of a product known as the "Pedi-Pulsor", which World Medical was marketing. When Tiffany refused, Lewis issued four summonses on October 6, 1981.

Each summons identified "Tiffany Fine Arts, Inc. and Subsidiaries" as the subjects of an IRS investigation. Two were addressed to Tiffany Fine Arts, Inc. in care of Steven Hofstein, President, and Janine Martinelli, Secretary and Treasurer, and directed them to appear before Lewis to give testimony and to produce the following documents:

> (1) All books, papers, records and other data pertaining to the operation of Tiffany Fine Arts Inc. and subsidiaries (including World Medical Marketing Corp.) for the periods ending October 31, 1979 and October 31, 1980, including but not limited to the following specific records: general ledger, sales journal, purchase book, cash receipts book, cash disbursement book, cancelled checks and bank statements, workpapers, sales contracts, and purchase invoices for the above described periods.
>
> (2) A list of the names, addresses, social security and employer identification numbers for all individuals, partnerships, estates, trusts and corporations who acquired: Pedi-Pulsor distributorships from World Medical Marketing Corporation Inc., World Medical Marketing Corporation, World Video Corporation or any other subsidiary corporation of Tiffany Fine Arts Inc.
>
> (3) A list of the names, addresses, social security and employer identification numbers for all individuals, partnerships, estates, trusts and corporations who acquired lithographs from Tiffany Fine Arts Inc.
>
> (4) A list of the names, addresses, social security and employer identification numbers for all individuals, partnerships, estates, trusts and corporations who acquired any asset, distributorship, etc. from Tiffany Fine Arts Inc., World Medical Marketing Corporation, World Video Corporation or any other subsidiary corporation of Tiffany Fine Arts Inc.

The remaining two summonses were addressed to World Medical Marketing Corp., in care of Peter Rosenthal, President, and Janine Martinelli, Secretary and Treasurer, and directed them to give testimony and to produce the following documents:

> (1) All books, papers, and other data pertaining to the operation of World Medical Marketing Corporation (a subsidiary of Tiffany Fine Arts Inc.), for the periods ending October 31, 1979 and October 31, 1980, including but not limited to the following specific records: general ledger, sales journal, purchase book, cash receipts book, cash disbursement book, cancelled checks and bank statements, workpapers, sales contracts and purchase invoices for the above described periods.
>
> (2) A list of the names, addresses, social security and employer identification numbers for all individuals, partnerships, estates, trusts and corporations who acquired Pedi-Pulsor distributorships from World Medical Marketing Corporation. Also copies of the application for license fact sheets signed by each licensee.

When Tiffany refused to comply with the summonses, the IRS initiated this enforcement proceeding under 26 U.S.C. §§ 7402(b) and 7604 with an order to show cause and petition, supported by an affidavit of agent Lewis which briefly explained:

> * * * I am conducting an investigation, one purpose of which is to ascertain the correctness of the consolidated corporate income tax returns filed by [Tiffany] for the fiscal years ending October 31, 1979, and October 31, 1980. One aspect of my investigation into the correctness

> of Tiffany's consolidated corporate income tax returns concerns possible underreporting of income received and questionable business deductions claimed by [Tiffany].

In opposition, Tiffany's president, Steven R. Hofstein, asserted, among other things, that the "true motive" of the IRS was "to ascertain and audit the tax returns of [Tiffany's] clients, not [Tiffany]". He emphasized that the IRS was unwilling to accept redacted records or to limit its examination to a random check of Tiffany's clients. He also noted that the summonses requested information concerning purchasers of lithographs, whom the IRS had singled out for special audit. Since Tiffany had never engaged in the sale of lithographs, Hofstein argued that this confirmed that the IRS was "on a blatant fishing expedition which cannot be condoned pursuant to I.R.C. § 7602." In an accompanying memorandum of law, Tiffany argued that the IRS could obtain the third party information it desired only by satisfying the requirements for a "John Doe" summons set forth in § 7609(f).

By a supplemental affidavit agent Lewis elaborated on the reasons underlying his investigation of Tiffany. He suspected that Tiffany "may have underreported its gross receipts because certain recourse and non-recourse notes provided by the licensees of a product distributed by World Medical did not appear to be included in World Medical's income." To verify the accuracy of Tiffany's returns, he "would have to examine the original books of entry and the underlying licensing agreements to match the income reflected by those agreements to the income reported by World Medical." Thus, asserted Lewis, Tiffany's offer to produce only certain redacted records was unacceptable.

As to the lithograph issue, Lewis explained that "I had information from another source that a company called 'Tiffany,' which did business in Florida, was in the business of selling lithographs." When he initially inquired whether the two companies, were one and the same, Tiffany's attorney "would neither confirm nor deny that the Tiffany herein sold litho-

graphs." Thus, he requested records relating to lithographs "out of an abundance of caution".

With respect to Tiffany's charges concerning the motivation of the IRS, however, Lewis conceded that by examining the licensing agreements, I would also be able to identify individuals who have participated in what appears to be an abusive tax shelter. It is certainly possible that once the individuals are identified further inquiry will be made into whether they have correctly reported their income tax liabilities.

After oral argument, Judge Broderick held that the IRS had made a sufficient showing that its "interest is in an audit of the consolidated returns of Tiffany." He therefore ruled that the IRS was authorized to issue the four summonses under 26 U.S.C. § 7602, without additionally having to satisfy the requirements of § 7609(f). He also ruled that no evidentiary hearing was necessary since Tiffany's "hypothesis" that the IRS's real motivation was solely to audit Tiffany's clients was rebutted by a "clear factual statement" that the IRS was legitimately interested in Tiffany's own tax liabilities.

On appeal, the parties repeat essentially the same arguments they advanced below. Based on the broad sweep of the four summonses, which followed the IRS's initial request for third party information, Tiffany argues that the summonses were, at best, issued for the dual purpose of investigating both it and its clients and, at worst, purely pretextual. In either event, it contends, the IRS was required to comply with § 7609(f) since a "substantial objective" of the summonses was the identification of unnamed taxpayers. At the very least, Tiffany claims, the district judge should have ordered a hearing to determine whether the IRS was proceeding in good faith.

The IRS, on the other hand, maintains that it is conducting an ongoing, particularized investigation of Tiffany. While it does not concede that the summonses were issued for a dual purpose, it argues that its legitimate concerns with Tiffany make compliance with § 7609(f) unnecessary, regardless of whether it may also be concerned with Tiffany's customers. Finally, the IRS contends that no hearing was required in the district court.

DISCUSSION

To place these competing claims about the IRS's administrative summonses in context, we begin by briefly surveying the backdrop of statutory and case law against which § 7609(f) was enacted in 1976. Section 7601 of the 1954 Code generally authorizes the IRS to "inquire after and concerning all persons * * * who may be liable to pay any internal revenue tax, and all persons owning or having the care and management of any objects with respect to which any tax is imposed." Section 7602 empowers the IRS "[t]o examine any books, papers, records, or other data which may be relevant or material" to an inquiry into "the correctness of any return". Section 7604(b) permits the IRS to petition the district court to enforce its administrative summonses.

[1, 2] The general criteria for judicial enforcement of any IRS summons were established by the Supreme Court in *Reisman v. Caplin*, 375 U.S. 440, 84 S.Ct. 508, 11 L.Ed.2d 459 (1964), and *United States v. Powell*, 379 U.S. 48, 85 S.Ct. 248, 13 L.Ed.2d 112 (1964). As this court recently summarized in *In re Tax Liabilities of John Does*, 688 F.2d 144, 147—48 (2d Cir.1982):

> In general, to obtain judicial enforcement of a summons, the Government is required * * * to make a prima facie showing that: (1) its investigation was being conducted for a legitimate purpose; (2) its inquiry may be relevant to that purpose; (3) the information sought is not already within the Government's possession; and (4) the administrative steps required by the Internal Revenue Code have been followed. Once that showing is made, the burden shifts to the summoned party who may challenge summons enforcement on any "'appropriate * * * ground,'" * * * or otherwise prove that enforcement would constitute an abuse of the court's process.

(citations and footnotes omitted).

Within this statutory framework, the Supreme Court ruled in *United States v. Bisceglia*, 420 U.S. 141, 95 S.Ct. 915, 43 L.Ed2d 88 (1975), that the IRS was authorized under the broad language of §§ 7601 and 7602 to issue a so-called "John Doe" summons, one that seeks books and records of a transaction without naming the taxpayer involved. *Bisceglia* involved an administrative summons which the IRS issued to a bank to discover the identity of a customer who had deposited 400 deteriorated $100 bills. Given the suspicious nature of the transaction, a majority of the Court had little difficulty approving this use of the summons power. While the *Bisceglia* majority apparently recognized that its expansive interpretation of §§ 7601 and 7602 created a risk that the IRS might attempt "to conduct 'fishing expeditions' into the private affairs" of unnamed taxpayers, 420 U.S. at 150, 95 S.Ct. at 921, it reasoned that by creating the enforcement proceeding mechanism Congress had intended to place the federal courts between the IRS and the person summoned, and that the courts could contain this threat by narrowing the scope of or refusing to enforce abusive summonses. *Id.* at 146, 95 S.Ct. at 919.

Troubled by the implications of *Bisceglia*, Congress enacted § 7609(f) as part of the Tax Reform Act of 1976, Pub.L. No. 94—455, § 1205(a), 90 Stat. 1520, 1701—02, to prevent indiscriminate use of the John Doe summons. In doing so Congress attempted to strike a balance between the legitimate needs of the IRS and the privacy interests of unidentified third parties. For example, the house committee which drafted the provision observed that "[t]he use of the administrative summons * * * is a necessary tool for the IRS in conducting many legitimate investigations * * * [but] should not unreasonably infringe upon the civil rights of taxpayers, including the right to privacy." H.R.Rep. No. 94—658, 94th Cong., 2d Sess. 307, *reprinted in* [1976] U.S.Code Cong. & Ad. News 2897, 3202. The same report later noted that "[w]hile * * * it is important to preserve the John Doe summons as an investigative tool which may be used in appropriate circumstances * * * the committee does not intend that the John Doe

summons is to be available for purposes of enabling the Service to engage in a possible 'fishing expedition.' " *Id.* at 3207.

To accommodate these conflicting interests, the committee report anticipated "that when the Service does seek court authorization to serve [a] John Doe summons, it will have specific facts concerning a specific situation to present to the court." *Id.* At the same time, however, the committee expressly did "not intend to impose an undue burden on the Service in connection with obtaining a court authorization to serve this type of summons. * * * It is enough for the Service to reveal to the court evidence that a transaction has occurred, and that the transaction * * * is of such a nature as to be reasonably suggestive of the possibility that the correct tax liability with respect to that transaction may not have been reported * * *." *Id.*

This balance is reflected in the statutory scheme Congress established. Section 7609(f) sets out the modest standards the IRS must satisfy to serve a John Doe summons, defined as one "which does not identify the person with respect to whose liability the summons is issued", and it requires advance approval by the court. Section 7609(h) permits the district court to approve the John Doe summons in an *ex parte* proceeding which "shall be * * * [determined] solely on the petition and supporting affidavits."

With this background in mind, we turn to the central issue on this appeal: whether an IRS summons issued under § 7602 in connection with the investigation of a named taxpayer, which might also facilitate the investigation of unnamed taxpayers, is subject to the requirements of § 7609(f). While this court has not previously addressed this issue, the Sixth, Eighth and Eleventh Circuits recently have. *United States v. Thompson,* 701 F.2d 1175 (6th Cir. 1983); *United States v. Barter Systems, Inc.,* 694 F.2d 163 (8th Cir. 1982); *United States v. Gottlieb,* 712 F.2d 1363 (11th Cir. 1983).

In *Barter Systems,* the IRS issued a summons to an organized barter exchange under § 7602, requesting, among

other things, the names and account numbers of the exchange's members, as well as information concerning transactions in which those members had engaged. The Eighth Circuit held:

> [T]he John Doe summons procedures of 26 U.S.C. § 7609(f)(1976) do not apply to the issuance of a summons which has the purpose of determining a known taxpayer's liabilities and produces the fallout or further effect of discovering information that would aid in identifying unnamed taxpayers and investigating their tax liabilities.

694 F.2d at 169. Relying on *United States v. Euge,* 444 U.S. 707, 711, 100 S.Ct. 874, 878, 63 L.Ed.2d 141 (1980), for the proposition that the IRS's summons authority "should be upheld [under § 7602] absent express statutory prohibition or substantial countervailing policies", the court in *Barter Systems* emphasized that § 7609(f), by its express terms, only applies "in the case of a John Doe summons" which "does not identify the person with respect to whose liability the summons is issued." 694 F.2d at 167-68. The court therefore determined that the summons in question "was not a John Doe summons" since it identified the exchange as a target of an IRS investigation. *Id.* at 168. Looking to the legislative history of § 7609(f), the court found no indication that Congress intended the John Doe procedures to apply to any summons that identified a particular taxpayer even though it might also aid in the investigation of unnamed third parties, *Id.* at 168—69. *Accord United States v. Constantinides,* 1981—1 U.S.T.C. (CCH) ¶ 9317 (D.Md.1980).

The Eleventh Circuit reached essentially the same conclusion in *United States v. Gottlieb,* which also involved a barter exchange. Emphasizing "that a deferential standard must be applied when construing congressional intent regarding the scope of the IRS's summons authority", the court

> agree[d] with the Eighth Circuit that the claimed authority is necessary for the effective enforcement of the tax laws, that there clearly is no express statutory prohibition against

the enforcement of the summons in question, and that neither the statute nor the legislative history identifies any substantial countervailing purposes which require us to deny enforcement of the summons.

At 1369.

The Sixth Circuit, however, reached the opposite conclusion in *United States v. Thompson*, another barter exchange case. As in both *Barter Systems* and *Gottlieb*, the facts in *Thompson* suggested that the IRS had a dual purpose in mind when it issued the summons in question. Because the summons did not identify *each* "person with respect to whose liability the summons is issued", however, the court concluded that "in a most literal sense the language of § 7609(f) is triggered here." 701 F.2d at 1180.

[3] We think the position taken by the Eighth and Eleventh Circuits represents the better view. A formidable line of Supreme Court cases establish that the summons power of the IRS should be construed broadly. *United States v. Euge*, 444 U.S. at 714—18, 100 S.Ct. at 879—81; *United States v. Bisceglia*, 420 U.S. at 150, 95 S.Ct. at 921; *Donaldson v. United States*, 400 U.S. 517, 535, 91 S.Ct. 534, 544, 27 L.Ed.2d 580 (1971); *United States v. Powell*, 379 U.S. at 53—54, 85 S.Ct. at 252—53; *United States v. Chamberlain*, 219 U.S. 250, 269, 31 S.Ct. 155, 162, 55 L.Ed. 204 (1911). *See also United States v. Arthur Young & Co.*, 677 F.2d 211, 218 (2d Cir.1982), *cert. granted*, — U.S. —, 103 S.Ct. 1180, 75 L.Ed.2d 429 (1983). In the absence of any explicit indication in the language or legislative history of § 7609(f) that the John Doe procedures should apply to a dual purpose summons, we therefore cannot accept the narrow, literal construction adopted by the Sixth Circuit and urged by Tiffany here. As far as we can determine, the drafters of § 7609(f) addressed only a situation, like *Bisceglia*, in which the IRS issued a summons to an identifiable party in whom it had no interest in order to investigate the potential tax liabilities of unnamed third parties. We agree

with the Eighth and Eleventh Circuits that § 7609(f) should be limited to that context.

There is further, albeit indirect, support for this conclusion in the legislative history. As the house report indicates, Congress sought to balance its concern with protecting the privacy interests of unnamed taxpayers against its concern with not imposing undue burdens on the IRS. Adopting Tiffany's position could easily destroy the delicate balance struck by § 7609(f), because virtually any IRS summons is likely to uncover some information that could be used to identify or investigate third party taxpayers, and if every recipient of a summons issued under § 7602 could demand that the IRS satisfy the requirements of § 7609(f), the IRS would be shouldered with significantly greater administrative burdens than Congress intended.

[4] As noted by the Eleventh Circuit in *Gottlieb*, at 1369, Tiffany's position is also inconsistent with two lines of analogous cases involving dual purpose summonses. The Supreme Court's decisions in *United States v. LaSalle National Bank*, 437 U.S. 298, 98 S.Ct. 2357, 57 L.Ed.2d 221 (1978), and *Donaldson v. United States*, 400 U.S. 517, 91 S.Ct. 534, 27 L.Ed.2d 580 (1971), establish that even if the primary purpose of the issuing agent is to investigate criminal conduct, a summons issued under § 7602 is enforceable, provided that the IRS has not abandoned in an institutional sense the pursuit of civil tax determination or collection. *See also United States v. Morgan Guaranty Trust Co.*, 572 F.2d 36 (2d Cir.), *cert. denied*, 439 U.S. 822, 99 S.Ct. 89, 58 L.Ed.2d 114 (1978). Similarly, numerous courts have held that an IRS summons issued primarily to obtain research data is enforceable as long as it is also supported by a civil tax determination purpose. *E.g., United States v. First National Bank in Dallas*, 635 F.2d 391, 395—96 (5th Cir.), *cert. denied*, 452 U.S. 916, 101 S.Ct. 3051, 69 L.Ed.2d 420 (1981); *United States v. Pittsburgh Trade Exchange Inc.*, 644 F.2d 302, 307—08 (3rd Cir.1981); *United States v. Flagg*, 634 F.2d 1087, 1091—92 (8th Cir. 1980), *cert. denied*, 451 U.S. 909, 101 S.Ct. 1977, 68 L.Ed.2d 297 (1981)

United States v. Island Trade Exchange, Inc., 535 F.Supp. 993, 997 (E.D.N.Y.1982). Thus, even assuming that the summonses in this case were issued to Tiffany partly for the purpose of investigating Tiffany's customers, the existence of that purpose—regardless of how it is characterized—does not invalidate the summonses because the IRS is pursuing the civil tax liability of a named taxpayer, Tiffany.

[5, 6] The only remaining issue is whether Judge Broderick abused his discretion in declining to hold a hearing to determine whether the IRS was legitimately concerned with Tiffany when it issued the four summonses. We hold that no hearing was necessary. Unless a taxpayer opposing enforcement of a summons makes a "substantial preliminary showing" of an alleged abuse, neither an evidentiary hearing nor limited discovery need be ordered by the district court. *United States v. Morgan Guaranty Trust Co.*, 572 F.2d at 42—43 n. 9; *see United States v. Noall*, 587 F.2d 123, 127 (2d. Cir.1978), *cert. denied*, 441 U.S. 923, 99 S.Ct. 2031, 60 L.Ed.2d 396 (1979). The Hofstein affidavit did raise some question as to whether the IRS was "primarily" interested in Tiffany or in its customers. But we have concluded that the only relevant question is whether, the IRS was legitimately conducting an ongoing investigation of Tiffany's tax liability, and the allegations in the Hofstein affidavit do not amount to the type of "substantial preliminary showing" that would require further inquiry on that issue. Since the affidavits by agent Lewis established an ongoing IRS investigation of Tiffany sufficient to support the summonses issued here without compliance with the John Doe provisions of § 7609(f), Judge Broderick was well within his discretion in declining to order an evidentiary hearing.

Affirmed.

Appendix B

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the twenty-eighth day of October , one thousand nine hundred and eighty-three.

UNITED STATES and JOEL LEWIS, Revenue Agent, Internal Revenue Services,

Plaintiff-Appellees,

v. No. 82-6336

TIFFANY FINE ARTS, Inc., et al.,

Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellants, Tiffany Fine Arts, Inc., et al.,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk

Francis X. Gindhart

by Francis X. Gindhart,
Chief Deputy Clerk

Exhibit A

Appendix C

United States Court of Appeals
FOR THE SECOND CIRCUIT

82-6336 79

UNITED STATES and JOEL LEWIS, Revenue Agent, Internal Revenue Sevices,

Plaintiff-Appellees,

v.

TIFFANY FINE ARTS, et al.,

Defendants-Appellants.

Use short title

82-6336
Docket Number

NOTICE OF MOTION

state type of motion

for stay of mandate pursuant to Fed. R. App. P. Rule 41(b)

MOTION BY: *(Name and tel. no. of law firm and of attorney in charge of case)*

Michael D. Savage, Esq.
Gersten, Savage & Kaplowitz
150 East 58th Street
New York, N.Y. 10155 - 752-9700

OPPOSING COUNSEL: *(Name and tel. no. of law firm and of attorney in charge of case)*

Frederick M. Lawrence, Esq.
Office of U. S. Attorney
St. Andrews Plaza
New York, N.Y.
791-7096

UNITED STATES COURT OF APPEALS
NOV - 4 1983
SECOND CIRCUIT

Has consent of opposing counsel:
A. been sought? ☐ Yes ☒ No
B. been obtained? ☐ Yes ☒ No
Has service been effected? ☒ Yes ☐ No
Is oral argument desired? ☐ Yes ☒ No
(Substantive motions only)
Requested return date:
(See Second Circuit Rule 27(b))
Has argument date of appeal been set:
A. by scheduling order? n/a ☐ Yes ☐ No
B. by firm date of argument notice? ☐ Yes ☐ No
C. If Yes, enter date:
Judge or agency whose order is being appealed:

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? ☐ Yes ☐ No
(See F.R.A.P. Rule 8) n/a
Would expedited appeal eliminate need for this motion? n/a ☐ Yes ☐ No
If No, explain why not:

Will the parties agree to maintain the status quo until the motion is heard? ☐ Yes ☒ No

Brief statement of the relief requested:
Respondents-Appellants requested a stay of mandate to the District Court pending application to the Supreme Court of the United States for a writ of certiorari.

Complete Page 2 of This Form

By: *(Signature of attorney)*

Appearing for: *(Name of party)*
TIFFANY FINE ARTS, INC. and its subsidiaries, including WORLD MEDICAL MARKETING CORPORATION and WORLD VIDEO CORP.

Appellant or Petitioner: ☐ Plaintiff ☐ Defendant (Respondent)
Appellee or Respondent: ☒ Plaintiff ☐ Defendant (Petitioner)

Signed name must be printed beneath
Richard B. Lind
Gersten, Savage & Kaplowitz

Date
November 3, 1983

ORDER

Kindly leave this space blank

IT IS HEREBY ORDERED that the motion

UNITED STATES COURT OF APPEALS
FILED
NOV 21 1983
SECOND CIRCUIT

be and it hereby is granted

Dated 11-21-83

Circuit Judges

FILED
FEB 22 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1007 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1983

TIFFANY FINE ARTS, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether an IRS summons, issued to a named taxpayer in connection with an investigation of that person's tax liability, must meet the special requirements applicable to a "John Doe summons," where the information sought might incidentally facilitate the investigation of other, unnamed taxpayers.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	9

TABLE OF AUTHORITIES

Cases:

United States v. *Barter Systems, Inc.*, 694 F.2d 163	4, 7, 8
United States v. *First National Bank*, 635 F.2d 391, cert. denied, 452 U.S. 916	6
United States v. *Flagg*, 634 F.2d 1087, cert. denied, 451 U.S. 909	6
United States v. *Gottlieb*, 712 F.2d 1363	4, 7, 8
United States v. *LaSalle National Bank*, 437 U.S. 298	6
United States v. *Powell*, 379 U.S. 48	5
United States v. *Thompson*, 701 F.2d 1175	4, 7, 8

Statutes:

Internal Revenue Code of 1954 (26 U.S.C.):	
§ 6045	8
§ 7402(b)	3
§ 7602	6
§ 7602(a)(1)	2, 5
§ 7604	3
§ 7609(f)	*passim*
Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324 *et seq.*:	
§ 311(a)(1), 96 Stat. 600	8-9
§ 333(a), 96 Stat. 622	6

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1007

TIFFANY FINE ARTS, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 718 F.2d 7. The district court did not issue a written opinion.

JURISDICTION

The judgment of the court of appeals (Pet. App. A1) was entered on September 13, 1983. A petition for rehearing was denied on October 28, 1983 (Pet. App. A13). The petition for a writ of certiorari was filed on December 19, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners are related corporations that promote tax-sheltered investments (Pet. App. A2). The IRS in 1981 began an investigation to determine petitioners' correct tax liability for 1979-1980. In aid of that investigation, the Service issued summonses to petitioners under Section 7602(a)(1) of the Code.[1] The summonses requested production of petitioners' financial records and books of account, as well as a list of names, addresses, and taxpayer identification numbers of persons who had acquired "Pedi-Pulsor" distributorships from petitioners. Pet. App. A2-A3.[2] A "Pedi-Pulsor" is a medical device (Pet. 4).

Petitioners refused to comply with the summonses, contending that the IRS could obtain information about their customers and franchisees only in accordance with Section 7609(f) of the Code. That Section sets forth special requirements for issuance of a "John Doe summons," *i.e.*, a summons "which does not identify the person with respect to whose liability

---

[1] Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the Code or I.R.C.).

[2] One of the summonses also requested production of a list of clients "who acquired lithographs from Tiffany Fine Arts, Inc." (Pet. App. A2). Tiffany Fine Arts does not in fact sell lithographs (Pet. 5, 6). The IRS agent testified that he had received information that a company called "Tiffany" was selling lithographs in Florida (Pet. App. A4). Upon inquiry, petitioners' attorney refused to confirm or deny that Tiffany Fine Arts sold lithographs (*ibid.*). The agent accordingly included in the summons a request for lithograph information "out of an abundance of caution" (*id.* at A4-A5).

the summons is issued."[3] Upon petitioners' refusal to comply, the government brought this action to enforce the summonses in the United States District Court for the Southern District of New York. Pet. App. A3; I.R.C. §§ 7402(b), 7604.

In support of its enforcement petition, the government introduced affidavits of the IRS agent who was handling the audit of petitioners. The agent stated that he was "conducting an investigation, one purpose of which [was] to ascertain the correctness of [petitioners'] corporate income tax returns" (Pet. App. A3). The agent was concerned about questionable business deductions and "possible underreporting of income" by petitioners, an underreporting he suspected might be traceable to an omission from income of "certain recourse and non-recourse notes provided by [Pedi-Pulsor] licensees" (*id.* at A4). To verify the correctness of petitioners' returns, the agent explained, it was necessary to identify petitioners' customers, examine the licensing agreements the customers signed, and compare the amounts shown in those agreements with the amounts petitioners reported; petitioners' offer to furnish redacted records was thus unacceptable (*ibid.*). The agent conceded

---

[3] Under Section 7609(f), the IRS may serve a "John Doe summons" only if the Commissioner establishes that:

> (1) the summons relates to the investigation of a particular person or ascertainable group or class of persons,
>
> (2) there is a reasonable basis for believing that such person or group or class of persons may fail or may have failed to comply with any provision of any internal revenue law, and
>
> (3) the information sought to be obtained from the examination of the records (and the identity of the person or persons with respect to whose liability the summons is issued) is not readily available from other sources.

that the summonsed information, besides facilitating his investigation of petitioners, could also facilitate investigation of petitioners' clients. He acknowledged the possibility that the IRS, after receiving the information, might make "further inquiry * * * into whether [the clients] ha[d] correctly reported their income" (*id.* at A5).

The district court ordered the summonses enforced, finding that an evidentiary hearing to determine the IRS's "real motivation" was unnecessary in light of the revenue agent's uncontradicted affidavit (Pet. App. A5). The court of appeals unanimously affirmed (*id.* at A1-A12). It held that the "John Doe" rules of Section 7609(f) have no application where (as here) the IRS issues a summons to a named taxpayer in aid of a bona fide investigation of that person's tax liability. The court deemed irrelevant the possibility that records thus summonsed might prove useful in auditing other, unnamed taxpayers, citing the absence of any indication that Congress intended Section 7609(f) to apply in such situations (Pet. App. A10), and noting this Court's consistent holdings that the IRS summons power "should be construed broadly" (*ibid.*, citing cases). In so ruling, the court below followed the reasoning of the Eighth and Eleventh Circuits in *United States* v. *Barter Systems, Inc.*, 694 F.2d 163 (8th Cir. 1982), and *United States* v. *Gottlieb*, 712 F.2d 1363 (11th Cir. 1983), and rejected as unpersuasive the contrary reasoning of the Sixth Circuit in *United States* v. *Thompson*, 701 F.2d 1175 (1983). Finally, the court of appeals held that the trial judge had not abused his discretion in declining to hold an evidentiary hearing, noting that the revenue agent's affidavits "established an ongoing IRS investigation of [petitioners] sufficient to support the summonses * * * without compliance with the John Doe provisions" (Pet. App. A12).

ARGUMENT

The decision below is correct. Contrary to petitioners' contention, there is no conflict among the circuits on the question presented. There is no basis for review by this Court.

1. The court of appeals correctly held that the "John Doe" provisions have no application to the summonses involved here. Section 7609(f) by its terms applies only if a summons "does not identify the person with respect to whose liability [it] is issued." The legislative history, moreover, shows that Congress intended the Section to apply only where "the IRS [has] issued a summons to an identifiable party *in whom it* [*has*] *no interest* in order to investigate the potential tax liabilities of unnamed third parties" (Pet. App. A10, emphasis added). In this case, the IRS was plainly interested in (indeed, was actively investigating) petitioners, and petitioners were clearly identified as the "person[s] with respect to whose liabilit[ies]" the summonses were issued. Since the summonses sought information "which [might] be relevant" in determining petitioners' tax liabilities (I.R.C. § 7602(a)(1)), and since the summonses were issued "in good faith" under the standards set forth in *United States* v. *Powell*, 379 U.S. 48, 53-54 (1964), enforcement was entirely proper.

Even if one assumes that the IRS in issuing the summonses was motivated by the "dual purpose" (Pet. 11) of investigating *both* petitioners *and* their clients, that assumption would not bring Section

7609(f) into play. In *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978), this Court sustained the validity of a "dual purpose" summons, ruling that a summons issued under Section 7602 is enforceable so long as the IRS in an institutional sense has not abandoned its purpose of civil tax determination, notwithstanding that the issuing agent's purpose is to investigate criminal conduct. 437 U.S. at 318.[4] By a parity of reasoning, the existence of a secondary purpose to obtain data useful in auditing petitioners' clients would not serve to trigger the operation of Section 7609(f) here. Cf. *United States* v. *Flagg*, 634 F.2d 1087, 1091-1092 (8th Cir. 1980), cert. denied, 451 U.S. 909 (1981) (enforcing summons issued to named taxpayer where IRS had secondary purpose of developing data for Taxpayer Compliance Measurement Program); *United States* v. *First National Bank*, 635 F.2d 391, 395-396 (5th Cir.), cert. denied, 452 U.S. 916 (1981) (same).

The decision below is supported both by common sense and by sound tax policy. As the court of appeals noted (Pet. App. A11), virtually every IRS summons is likely to yield information about parties with whom the taxpayer has dealt, and thus in some degree to facilitate the identification and investigation of unnamed taxpayers. On petitioners' theory, anyone who receives a summons under Section 7602 could demand that the IRS satisfy the more rigorous requirements of Section 7609(f), subjecting the

[4] After *LaSalle* was decided, Congress amended Section 7602 to permit the issuance of a summons to investigate both civil and criminal tax matters, so long as no "Justice Department referral is in effect." Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 333(a), 96 Stat. 622. The amendment became effective September 3, 1982.

Service to far greater administrative and enforcement burdens than Congress can possibly have intended. As noted above, Congress did not intend the John Doe rules to apply to summonses (like those here) issued to a named taxpayer who is himself under IRS investigation.

2. Contrary to petitioners' contention (Pet. 9-11), the decision below does not present the circuit conflict represented by *United States* v. *Barter Systems, Inc.*, 694 F.2d 163 (8th Cir. 1982), *United States* v. *Gottlieb*, 712 F.2d 1363 (11th Cir. 1983), and *United States* v. *Thompson*, 701 F.2d 1175 (6th Cir. 1983). Each of those cases involved a summons issued to a barter exchange whose tax liability was being investigated. The Eighth and Eleventh Circuits sustained the summonses' validity, holding that the existence on the IRS's part of a secondary purpose to investigate the exchanges' customers did not trigger the John Doe rules. 694 F.2d at 168-169; 712 F.2d at 1368-1369. The Sixth Circuit in *Thompson* reached the opposite conclusion. It noted that the IRS had instituted a nationwide "Barter Exchange Project" and had stated publicly that its objective was to identify barter exchange members as audit targets. 701 F.2d at 1176. Inferring from this that the IRS had adopted an "institutional posture" of identifying "an ascertainable group of persons whose potential liability [was] at issue" (*id.* at 1178, 1179), the Sixth Circuit concluded that the exchange's members, as well as the exchange itself, were "person[s] with respect to whose liability the summons [was] issued" within the meaning of Section 7609(f). The court explicitly limited its decision to cases "where it is shown that there exists a clear intent to investigate unknown third parties at the time the summons is issued"; distinguished the barter-exchange

situation "from other situations where there may not be such an established institutional purpose"; and held that its reasoning would not necessarily apply where there exists but "a remote possibility that in the course of the investigation * * * information might be discovered leading to investigations of then unidentified taxpayers." *Id.* at 1180.

The decision below does not conflict with *Thompson*. The IRS in this case, in contrast to the barter-exchange cases, had no "established institutional purpose" to investigate the summonsed taxpayer's clients. Rather, the district court found that "[the IRS's] interest [was] in an audit of the consolidated returns of [petitioners]," and the court discerned no more than a "possib[ility]" that the clients' returns might be examined (Pet. App. A5). The decisions below do not contain the finding, essential to the Sixth Circuit's holding in *Thompson* (701 F.2d at 1180), that at the time the summonses were issued "there exist[ed] a clear intent [on the IRS's part] to investigate unknown third parties." [5]

Even in the barter-exchange context, the conflict between *Thompson* on the one hand, and *Gottlieb* and *Barter Systems* on the other, may not require resolution by this Court. In 1981, Congress amended Section 6045 of the Code to require barter exchanges to provide the IRS with the names and addresses of all participants in barter transactions. Tax Equity

[5] Nor, contrary to petitioners' suggestion (Pet. 6, 10), could the inclusion in the summons, "out of an abundance of caution" (Pet. App. A4-A5), of a request for information about lithograph purchasers have furnished any basis for such a finding—a fact immaterial in any event in light of petitioners' assertion (Pet. 5, 6) that they have never sold lithographs. See page 2 note 2, *supra*.

and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 311(a)(1), 96 Stat. 600. Moreover, an appeal is now pending to the Sixth Circuit in *United States* v. *Barter Systems of Grand Rapids*, No. 82-1961, which involves the same issue as *Thompson*, and which will provide the Sixth Circuit an opportunity for en banc reconsideration of that decision.

3. Finally, petitioners contend (Pet. ii, 12-13) that the district court should have ordered an evidentiary hearing to determine whether the IRS was legitimately concerned with their tax liabilities or was merely using that investigation as a pretext "to circumvent the procedures of Section 7609(f)." As the court below held (Pet. App. A12), however, the decision whether to order an evidentiary hearing is committed to the trial judge's discretion. In view of the revenue agent's affidavits establishing a bona fide, on-going IRS investigation of petitioners, the district judge plainly did not abuse his discretion in declining to hold a hearing here. In any event, this basically factual question does not merit this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 83-1007

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

TIFFANY FINE ARTS, INC., *et al*
Petitioners

v.

UNITED STATES OF AMERICA, *et al*
Respondents

On Writ Of Certiorari To The United States Court of Appeals For The Second Circuit

BRIEF FOR PETITIONERS'

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QUESTIONS PRESENTED

(1) Whether an Internal Revenue Service general summons, issued under 26 U.S.C. §§ 7602 and 7604, which is served on a record keeper before an audit of the record keeper begins in substance and which seeks the identities of unnamed taxpayers, must comply with the provisions of 26 U.S.C. § 7609(f) regarding John Doe summonses, particularly when the Service has enunciated an institutional purpose to audit such unnamed taxpayers.

(2) Whether a record keeper served with such a summons is entitled to an evidentiary hearing to determine if a John Doe summons subject to the provisions of 26 U.S.C. § 7609(f) is masquerading as a general summons.

PARTIES

The parties in this case are Petitioners Tiffany Fine Arts, Inc., and its wholly-owned subsidiaries, World Video Corp. and World Medical Marketing Corp. and Respondents-Appellees the Internal Revenue Service by a Revenue Agent, Joel Lewis, and the United States of America.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
REPORTS OF OPINIONS	1
JURISDICTION	1
STATUTES INVOLVED	2
STATEMENT OF THE CASE	5
SUMMARY OF ARGUMENT	9
ARGUMENT	10
A. The Facts Establish That The Summonses Were Served To Obtain The Identities Of Unknown Taxpayers.	11
B. Section 7609(f) Requires The Application Of The John Doe Summons Procedures Whenever A Purpose Of A Summons Is To Obtain The Identities Of Unknown Taxpayers.	14
C. The Legislative History Of Section 7609(f) Confirms The Literal Meaning Of The Statute And The Need To Accommodate The Investigatory Power Of The IRS With The Congress's Directive On John Doe Summonses.	18
D. Due Process Requires Compliance With Section 7609(f).	22
E. The Deferential Standard Accorded To The Service's Summons Authority Is Not Applicable With Respect To The Summonses In This Case Because It Is The Courts' Own Authority Which Is At Issue And Because The Circumstances Under Which Deference Is Accorded The IRS Are Not Present.	24
F. Analogies To Summonses Issued During Civil/Criminal Investigations Are Inappropriate.	28
G. The Applicability Of Section 7609(f) Does Not Restrict The Service's Ability To Audit The Record Keeper As Long As It Conducts Its Audits Properly.	31

Table of Contents Continued

	Page
H. The Potential For Abuse Of The Courts' Process Requires The Application Of Section 7609(f) To Summonses Such As Those Served On Tiffany Or, At The Least, An Examination Of Whether Section 7609(f) Should Apply In Certain Cases.	34
CONCLUSION	38

TABLE OF AUTHORITIES

CASES: Page

Barter Systems, Inc., United States v., 694 F.2d 163 (8th Cir. 1982) 17

Bisceglia, United States v., 420 U.S. 141, 95 S.Ct. 915, 42 L.Ed. 2d 88 (1975) 18, 19, 36

Chang Fan Kwok v. *Immigration Service*, 392 U.S. 206, 88 S.Ct. 1970, 20 L. Ed. 2d 1037 (1968) 26

Donaldson v. *United States*, 400 U.S. 517, 91 S.Ct. 534, 27 L. Ed. 2d 580 (1971) 28

**Euge, United States* v., 444 U.S. 707, 100 S. Ct. 874, 63 L. Ed. 2d 141 (1980) 24, 25, 26

**Gottlieb, United States* v., 712 F. 2d 1363 (11th Cir. 1983) 24, 31

**Hannah* v. *Larche*, 363 U.S. 420, 80 S.Ct. 1502, 4 L. Ed. 2d 1307 (1960) 22

In the Matter of Tax Liabilities of John Does, 671 F. 2d 977 (6th Cir. 1982) 23

LaSalle National Bank, United States v., 437 U.S. 298, 98 S.Ct. 2357, 57 L. Ed. 2d 221 (1978) 28

Palmore v. *United States*, 411 U.S. 389, 93 S.Ct. 1670, 36 L. Ed. 2d 342 (1968) 26

**Powell, United States* v., 379 U.S. 48, 85 S.Ct. 248, 13 L. Ed. 2d 112 (1964) 20, 27, 28, 33, 36, 38

Salter, United States v., 432 F.2d 697 (1st Cir. 1970) 30

**Thompson, United States* v., 701 F.2d 1175 (6th Cir. 1983) 12, 16

Tiffany Fine Arts, Inc., United States v., 718 F.2d 7 (2nd Cir. 1983) 24

STATUTES:

Section 7602 (a) of the Internal Revenue Code of 1954, as amended, 26 U.S.C. § 7602(a) 15, 18

Section 7604 of the Internal Revenue Code of 1954, as amended, 26 U.S.C. § 7604 ..... 8, 36

Section 7605 of the Internal Revenue Code of 1954, as amended, 26 U.S.C. § 7605 18

Table of Authorities Continued

Page

*Section 7609(c) and (f) of the Internal Revenue Code of 1954, as amended, 26 U.S.C. § 7609(c) and (f) 7, 10, 15, 28

Section 7609(h) of the Internal Revenue Code of 1954, as amended, 26 U.S.C. § 7609(h) 10, 23

OTHER AUTHORITIES:

**General Explanation of the Tax Reform Act of 1976*, Prepared by the Staff of the Joint Committee on Taxation, December 29, 1976 (Reproduced in 1976-3 (Vol. 2) Cum. Bull.) 19, 20, 23, 35

Income Tax Regulation [26 CFR] § 301.7602-1 15

IRS Procedural Regulation [26 CFR] § 601.105(b)(1) . 11

Internal Revenue Manual, Audit, § 4022 ..... 7, 8

Internal Revenue Manual, Audit, Manual Transmittal 4233, Chapter 200 ..... 32, 33

Internal Revenue Manual, Audit, § 42(17) 21

*Principal authorities

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---

BRIEF FOR PETITIONERS'

REPORTS OF OPINIONS

The opinion of the Second Circuit Court of Appeals in this case is reported at 718 F.2d 7 and is set forth in appellants' Petition for a Writ of Certiorari ("Petition"), Appendix A.

The order of the United States District Court for the Southern District of New York was not accompanied by an opinion. The order is set forth in the Joint Appendix, at 39a-40a.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The statutory basis for jurisdiction in the United States District Court is 28 U.S.C. § 1331.

The decision sought to be reviewed herein was entered by the United States Court of Appeals for the Second Circuit on September 13, 1983. An order denying a rehearing was entered by the Court of Appeals on October 28,1983. That order is set forth in Appendix B of the Petition. An order granting a stay of the mandate of the Court of Appeals to permit appellants to petition this Court for a writ of certiorari was entered on November 21, 1983. That order is set forth in Appendix C of the Petition. The Petition was filed with this Court on December 19, 1983.

STATUTES INVOLVED

The following statutes are involved in this case:

26 U.S.C. (Internal Revenue Code of 1954, as amended) § 7602(a):

> AUTHORITY TO SUMMON, ETC. For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized—
>
> (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;
>
> (2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place

> named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and
>
> (3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

26 U.S.C. § 7604(a).

> JURISDICTION OF DISTRICT COURT—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

26 U.S.C. § 7609(c):

> (1) IN GENERAL—Except as provided in paragraph (2), a summons is described in this subsection if it is issued under paragraph (2) of section 7602 or under section 6420(e)(2), 6421(f)(2), or 6427(b)(2) and requires the production of records.
>
> (2) EXCEPTIONS—A summons shall not be treated as described in this subsection if—
>
> (A) it is solely to determine the identity of any person having a numbered account (or similar arrangement) with a bank or other institution described in subsection(a)(3)(A), or
>
> (B) it is in aid of the collection of—
>
> (i) the liability of any person against whom an assessment has been made or judgment rendered, or
>
> (ii) the liability at law or in equity of any transferee or fiduciary of any person referred to in clause (i).

(3) RECORDS, CERTAIN RELATED TESTIMONY—For Purposes of This Section—

(A) the term "records" includes books, papers, or other data, and

(B) a summons requiring the giving of testimony relating to records shall be treated as a summons requiring the production of such records.

26 U.S.C. § 7609(f):

ADDITIONAL REQUIREMENT IN THE CASE OF A JOHN DOE SUMMONS—Any summons described in subsection (c) which does not identify the person with respect to whose liability the summons is issued may be served only after a court proceeding in which the Secretary establishes that—

(1) the summons relates to the investigation of a particular person or ascertainable group or class of persons,

(2) there is a reasonable basis for believing that such person or group or class of persons may fail or may have failed to comply with any provision of any internal revenue law, and

(3) the information sought to be obtained from the examination of the records (and the identity of the person or persons with respect to whose liability the summons is issued) is not readily available from other sources.

26 U.S.C. § 7609(h)(2):

SPECIAL RULE FOR PROCEEDINGS UNDER SUBSECTIONS (f) AND (g).—The determination required to be made under subsections (f) and (g) shall be made ex parte and shall be made solely on the petition and supporting affidavits.

STATEMENT OF THE CASE

Petitioners (hereinafter, "Tiffany") sell products to investors under arrangements which the Internal Revenue Service ("IRS" or "Service") views as "tax shelters." During 1979 and 1980 Tiffany sold to various persons approximately 50 to 100 licenses for one of Tiffany's products—a medical device called a "Pedi-Pulsor." Under the structure of the licensing program, licensees received tax benefits for the years 1979 and 1980.

From the start, the Service's interest in Tiffany has been to determine the identities of its licensees on the theory that they were tax shelter investors. Sometime in the summer of 1981, Revenue Agent Joel Lewis ("Agent Lewis") visited the premises of Tiffany and requested the names, addresses and social security numbers of all Pedi-Pulsor licensees. Joint Appendix ("JA") 17a. Agent Lewis did not request the standard financial information which is necessary to conduct any legitimate audit of a taxpayer. *Id.* He sought only the identities of Tiffany's clients. Agent Lewis was referred to Tiffany's attorney who rejected his request for this information. *Id.*

No further contact with Agent Lewis occurred until October 6, 1981, when Tiffany was served with four IRS administrative summonses. These summonses are set forth in full in the Joint Appendix. JA 4a-7a. Two of them were issued to Tiffany Fine Arts, Inc. JA 4a and 5a. These two summonses seek identical information. The first paragraph of each summons requests the books and records of Tiffany and its subsidiaries. The next three paragraphs request the names, addresses and taxpayer identification numbers of persons who acquired Pedi-Pulsor distributorships (paragraph 2), of persons who acquired lithographs (paragraph 3), and of persons who acquired any asset (paragraph 4) from Tiffany Fine Arts,

Inc., or its subsidiaries. Tiffany has never sold lithographs. JA 18a.

The remaining two summonses were issued to a Tiffany subsidiary, World Medical Marketing Corp. JA 6a and 7a. These two summonses also seek identical information. The first paragraph of each summons requests the books and records of the company, and the second paragraph requests the names, addresses and taxpayer identification numbers of persons who acquired Pedi-Pulsor distributorships.

All four summonses were issued under Title 26, U.S.C. (Internal Revenue Code of 1954, as amended (hereinafter, "Code")) § 7602.

Tiffany offered to comply fully with the summonses—except for the disclosure of its clients' identities. It offered to produce for the IRS all of its books and records with the names of its clients redacted. JA 17a-18a. It also offered to permit the IRS to make random verification of clients' identities to assure that Tiffany's books were accurate. JA 17a. Tiffany took the position that, if the IRS were truly interested only in auditing Tiffany, the production of its records in this manner would be more than adequate. JA 18a.[1] The IRS was not interested in narrowing the scope of the summonses. JA 24a. Agent Lewis wanted Tiffany's client list, and he wanted it immediately.

Tiffany was thus faced with the following facts: The Service had requested its client list before even starting

[1] The Service was free to request Tiffany's client list at a later time—after it had examined Tiffany's other books and records—if it still felt that obtaining the client list was essential to its audit of Tiffany.

an audit. It was not interested in limiting even temporarily the scope of the summonses or postponing the production of the client list. And it believed that Tiffany was in the business of selling lithographs—a notorious tax shelter product by Agent Lewis' own admission. JA 22. Tiffany therefore reasoned that the IRS's true motive was to audit Tiffany's clients, not Tiffany, and that the IRS was interested primarily (possibly exclusively) in determining the tax liabilities of those clients. JA 18a. Tiffany concluded that each summons served by the IRS was in substance a "John Doe" summons described in Code § 7609(f)—a summons which did not identify the person with respect to whose tax liability it was issued. The IRS had not sought District Court approval prior to serving the summonses, as required by Code § 7609(f). In Tiffany's view, the Service had attempted to circumvent Code § 7609(f) by placing it under audit and serving the summonses under Code § 7602. Accordingly, Tiffany refused to comply with the summonses.

Although neither of the internal IRS procedures for issuing John Doe (Code § 7609(f)) or general investigatory (Code § 7602) summonses are burdensome, the summonses serve different goals and the procedures reflect the different goals.

The issuance by the Service of a general summons under Code § 7602 is a simple procedure. The Revenue Agent fills out a Treasury Department Form 2039, describing what information he wants and when and where he wants it. See JA 4a-7a. The Service's authority under general summonses has been afforded wide latitude, and in most cases the agent need not even seek approval from his supervisor. See Internal Revenue Manual, Audit ("IRM") § 4022.11(2) in *Commerce Clearing House*, Internal Revenue Manual, Audit, (hereinaf-

ter, "*CCH*"), at 7013-1. No approval was needed or sought in this case.

In contrast, because of the restricted use of the summons, the issuance of a John Doe summons under Code § 7609(f) requires more effort. A Revenue Agent does not have the authority to issue a John Doe summons. Advance approval must be obtained from the Agent's case manager or group manager. IRM § 4022.12(1) (*CCH* at 7013-1 - 7013-2). The Agent must demonstrate, among other things, that there is a "reasonable basis" for believing that a person or a class of persons is improperly avoiding tax. Code § 7609(f)(2); IRM § 4022.13(2) (*CCH* at 7013-2). The summons must also be approved by the Regional Counsel's office. IRM § 4022.13(4) (*CCH*, at 7013-2). If Regional Counsel disapproves the summons, the District Director forwards the case to the Regional Commissioner. IRM § 4022.13(7) (*CCH* at 7013-2). Once the Service has decided to issue the summons, the Agent asks the United States Attorney's office to prepare an *ex parte* petition to a District Court requesting the court to authorize the issuance of the summons. See Code § 7609(h)(2). The petition includes an affidavit by the Revenue Agent, providing facts which support the "reasonable basis" test of Code § 7609(f)(2). *Id.* Upon approval by the District Court, the summons may be served.

It would not be surprising if IRS agents tried to avoid this procedure for issuing John Doe summonses by putting the record keeper under audit and obtaining the customer lists under the simpler procedures of Code § 7602. Tiffany concluded that Agent Lewis had attempted to do just that, and it respectfully declined to comply.

In response to Tiffany's position, the Service, under Code § 7604, petitioned the U.S. District Court for the

Southern District of New York for an order compelling Tiffany to comply with the summonses. At a show cause hearing, Tiffany argued that the true objective of the IRS, as evidenced by Agent Lewis' conduct and the Internal Revenue Manual, was to obtain its client list, not to audit Tiffany, and that the summonses were in substance "John Doe" summonses which should have been issued under the procedures of Code § 7609(f). JA 27a. Tiffany asked the District Court to limit the scope of the summonses to exclude customer lists. In the alternative, Tiffany requested that the court conduct a hearing to determine whether the IRS was, in fact, serving a John Doe summons subject to the requirements of Code § 7609(f) under the guise of a general summons. JA32a.

The District Court, from the bench, rejected Tiffany's request for hearing and ordered the summonses enforced in full. JA 36a-37a. The Court stayed its order pending appeal. On appeal, the Court of Appeals for the Second Circuit upheld the decision and order of the District Court. See Petitioners' Petition for a Writ of Certiorari ("Petition"), A-1. The Court of Appeals stayed its order pending resolution of the appeal to this Court. Petition, A-14.

SUMMARY OF ARGUMENT

The facts of this case which are not in dispute, including the institutional posture of the IRS, establish that the summonses served on Tiffany were issued to obtain a list of Tiffany's clients. The language of Code § 7609(f), and the legislative history behind its enactment, leave no doubt that Code § 7609(f) applies to the summonses, and that the summonses should not be enforced since the Service did not follow the procedures contained in Code § 7609(f). Due process considerations also mandate that

Code § 7609(f) apply in the present case. Deferential standards which are often accorded to the IRS's investigatory powers are not applicable in this case because of the nature of the investigation and because these standards in effect compromise the courts' own power in favor of the IRS. The application of Code § 7609(f) does not burden the IRS's ability to conduct an audit of Tiffany, but it does prevent the potential for abuse of the courts' process which is created when the requirements of Code § 7609(f) are improperly circumvented. Therefore, the summonses should be quashed or limited in scope to exclude Tiffany's client list. Alternatively, a hearing should be ordered to determine the true purpose of the summonses.

ARGUMENT

Introduction. Code § 7609(f) (hereinafter, "section 7609(f)") provides that its procedural requirements must be met before the IRS can serve "any summons . . . which does not identify the person with respect to whose liability the summons is issued." These summonses are typically called "John Doe summonses." The most important requirement of section 7609(f) is that a federal court approve the summons before it is served. See also Code § 7609(h).

Determining whom a summons identifies is normally easy. It is certainly easy in this case. The summonses identify Tiffany. They do not identify any of Tiffany's clients. If they were issued "with respect to" Tiffany's tax liability, then they are not John Doe summonses. If they were issued "with respect to" the tax liabilities of Tiffany's clients, then they are John Doe summonses, and section 7609(f) applies. The questions before the Court are twofold: Whether the summonses served on Tiffany

were issued with respect to Tiffany's tax liability, its clients' tax liabilities, or both. And if they were issued with respect to the tax liabilities of both Tiffany and its clients, whether the John Doe summons procedures apply. These questions relate not only to the authority of the IRS but also to the authority of the federal courts.

A. The Facts Establish That The Summonses Were Served To Obtain The Identities Of Unknown Taxpayers.

The facts contained in the parties' affidavits which are not in dispute, and the IRS's institutional posture, show that the summonses were issued principally with respect to the tax liabilities of Tiffany's clients.

1. *The Affidavits.*

In his initial affidavit in support of the petition to enforce the summonses, Agent Lewis states: "I am conducting *an investigation, one purpose of which* is to ascertain the correctness of the consolidated income tax returns filed by Tiffany. . . ." JA 14a (emphasis supplied). It is noteworthy that Agent Lewis states that he is "conducting an investigation" rather than that he is examining Tiffany's tax returns. Indeed, he admits in both his original affidavit and in his supplemental affidavit (JA 21a) that an examination of Tiffany's tax return is only "one" purpose of the investigation. Revenue Agents do not conduct a wide variety of "investigations." All they do is ascertain the correctness of tax returns. Proc. Reg. § 601.105(b)(1). If one purpose of Agent Lewis' "investigation" was to audit Tiffany, the only other purpose could have been to audit someone else, as well.

Dr. Steven Hofstein, Tiffany's President, states in his affidavit that a Revenue Agent visited his offices "to request a list of names, addresses and social security numbers of every Pedi-Pulsor licensees (sic)." JA 17a.

This statement by Dr. Hofstein was the foundation of Tiffany's effort to quash the summonses. Its accuracy was essential to Tiffany's case. Yet Agent Lewis in his supplemental affidavit does not deny the accuracy of this statement or even try to explain it.

Dr. Hofstein also alleges in his affidavit: "Based upon the Service's previous demand for the list of licensees it would appear *quite clearly* that the *primary purpose* of the IRS is not to audit Tiffany and its subsidiaries, but to obtain the names of the Pedi-Pulsor licensees." JA 17a (emphasis supplied). Agent Lewis does not challenge that statement, either.

And Dr. Hofstein states: "The unstated but obvious purpose of the Summonses is to obtain a list of respondents' clients under the guise of a general audit." JA 18a. Agent Lewis, in his supplemental affidavit, neither denies that statement nor makes an effort to clarify his exact purpose.

In the context of an enforcement proceeding in which Tiffany was arguing that section 7609(f) applied, Dr. Hofstein's allegations were most damaging, particularly since one Court of Appeals had ruled that a summons served on another record keeper under similar circumstances was subject to section 7609(f). See *United States* v. *Thompson*, *infra* at 16. But instead of refuting Dr. Hofstein's allegations, in his supplemental affidavit Agent Lewis merely states that Tiffany's attorney, Mr. Robson, told him that "the true purpose of my investigation was to obtain certain confidential information, namely, a list of Tiffany's subsidiaries's (sic) licensees and purchasers, rather than to obtain information on the correctness of Tiffany's returns." JA 22a. Agent Lewis does not even say that he objected to Mr. Robson's allegation or attempted to correct it. He merely states that he

advised Mr. Robson that he would be forced to issue a summons. *Id.*

Accepting as true those portions of the Lewis affidavits not denied by Hofstein, and those portions of the Hofstein affidavit not denied by Lewis, it is abundantly clear that the purpose of the summonses was to obtain Tiffany's customer list, not to audit Tiffany.

2. *The IRS's institutional posture confirms its purpose.*

The conclusion drawn from the affidavits regarding the IRS's purpose is confirmed by the fact that the IRS as an institution has a clearly defined policy of identifying activities which it views as tax shelters and of obtaining the client lists of the people who "promote" them. That is precisely what the IRS was doing in its "audit" of Tiffany.

The Internal Revenue Manual, § 42(17) 0 *et seq.* (*CCH*, at 7347-31 *et seq.*) contains the IRS's "Tax Shelter Program." At the time that the Service issued the summonses to Tiffany, lithographs were thought to be a major business of Tiffany. "Lithographs" were also targeted by the IRS as a tax shelter area in need of attention. IRM § 42(17)0, Exhibit 42(17)0-1 (*CCH* at 7347-43). Agent Lewis confirms that lithographs received special attention from the IRS. JA 22a. IRS District Offices were directed to meet Tax Shelter "program objectives through their examination of returns of tax shelters, as well as tax shelter promoters' and *investors' returns*." IRM § 42(17)2.3 (12-9-80 version) (emphasis supplied). The District Offices' responsibilities were, in part, to:

(1) obtain a list of investors from the promoter and notify the districts having investors, and

(2) furnish to the investor districts all information needed to prepare and support an examination report for the investors.

Id.

Today, IRM § 42(17)2.3 (2-23-84 version) (*CCH*, at 7347-32) reads somewhat differently. It says (emphasis supplied):

> (2) District office personnel will screen and evaluate all information received with respect to tax shelters and forward information concerning out-of-district promoters *or investors* directly to affected districts. . . .

Both the earlier and the present versions of the Manual show the importance to the IRS of obtaining identities of investors. And IRM § 4222.33 (*CCH*, at 7231-14 - 7231-15), which describes the "Management of Interrelated and Related Cases" in the case of "Entities Acting as Agents for Investors" states (emphasis supplied):

> (5) When a promotion of Schedule C or F type Tax Shelter is identified, *client lists are obtained*, and the criteria in IRM 42(17)4:(3)(a) for controlling the arrangement is met, the following procedure should be used: . . .

If Tiffany's "arrangement" was a tax shelter, it was a "Schedule C type Tax Shelter." In its haste to obtain Tiffany's client list in accordance with IRS directives, the Service assumed, wrongly, that Tiffany was in the lithograph business. The events that transpired thereafter made it clear that, when Agent Lewis directed his attention to Tiffany, his objective was to obtain the names, addresses and social security numbers of Tiffany's clients, so that the clients could be audited.

B. Section 7609(f) Requires The Application Of The John Doe Procedures Whenever A Purpose Of A Summons Is To Obtain The Identities Of Unknown Taxpayers.

Under the facts described above, section 7609(f) by itself resolves the principal legal issue in this case. It

states that "*any* summons" (emphasis supplied) "which does not identify the person with respect to whose tax liability the summons was issued" may be served only after obtaining District Court authorization to serve it. The summonses served on Tiffany were issued at least in part with respect to the tax liabilities of Tiffany's customers. The IRS does not deny that. It does not even deny that the principal purpose of the summonses was to obtain the client list. But Tiffany's clients were not identified in the summons. Therefore, section 7609(f) literally applies.

The statute does not support an argument that Congress did not intend the John Doe rules to apply when a summons was served on a record keeper which was itself under audit. In fact, Congress anticipated that possibility and provided specifically that the John Doe rules do apply under these circumstances. Section 7609(f) states (emphasis supplied):

> Any summons described *in subsection (c)* which does not identify the person with respect to whose liability the summons is issued may be served only after a court proceeding. . . .

A number of summonses are described in "subsection (c)." One summons described in subsection (c) is a summons "issued under paragraph (2) of section 7602." Section 7602(a)(2) describes a summons issued to, among others, "the person liable for tax." Indeed, general IRS summonses which are served on taxpayers during an audit are issued under section 7602(a)(2). See Income Tax Regulation § 301.7602-1. Thus, section 7609(f) specifically contemplates that a general section 7602 summons served on a taxpayer during an audit—obviously with respect to its own tax liability—could also be a John Doe summons. It did not except such summonses from the

John Doe procedures of section 7609(f) merely because they were served on a taxpayer under audit.[2]

The Sixth Circuit Court of Appeals, in *United States* v. *Thompson*, 701 F.2d 1175 (1983), applied this common sense interpretation to the statute:

> Since this investigation arose as a part of the Barter Exchange Project, the "institutional posture" of the IRS as well as the "personal intent" of the agents was to target the members of the BSN, once identified through the summons process, as well as Thompson. (Footnote deleted.) *See generally United States* v. *LaSalle National Bank*, 437 U.S. 298, 316, 98 S.Ct. 2357, 2367, 57 L.Ed.2d 221 (1978). Agents Needham and Hissam admitted as much at the hearing, and it is repeatedly acknowledged in the IRS's brief and arguments. (Footnote deleted.) It is equally unquestioned that this intent existed at the time issuance of the subpoena was sought and was not merely formed after issuance of the subpoena or as an incidental effect of the resulting investigation. Under these circumstances, we believe that the literal language of the Code triggers the operation of the special procedures set forth in section 7609(f) and that it is immaterial that the primary purpose may have been to audit BSN. For authority we need look no further than the precise language and plan of the Code itself and, particularly, of section 7609(f).

701 F.2d at 1178-79. The Sixth Court also stated that its reading of the statute was "compelled" by the legislative history of the provision. 701 F.2d at 1180.

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[2] Congress did provide that the third party summons rules of Section 7609(a), which govern in the case of known taxpayers, do not apply if it is the record keeper's tax liability which is under investigation. See Code § 7609(a)(4)(A). However, it is submitted that the IRS could not circumvent the procedures of Code § 7609(a), either, merely by advising a Code § 7609(a) record keeper that it was under audit.

The Eighth Circuit Court of Appeals, in *United States* v. *Barter Systems, Inc.*, 694 F.2d 163 (1982), applied a mechanistic interpretation to the statute. *Barter Systems, Inc.* involved an IRS audit of an organized barter exchange and a summons served on the exchange which predominantly sought information about the exchange's members. The Eighth Circuit ruled that the John Doe procedures did not apply because "the summons did identify the person with respect to whose liability the summons was issued, namely, [Barter Systems, Inc.], and therefore was not a John Doe summons." 694 F.2d at 168. That ruling, however, is too facile. It avoids the substantive and governing question: with respect to whose liability was the summons issued? The Eighth Circuit, when it responded to that question, merely looked to the face of the summons and answered with the words "Barter Systems, Inc." However, the face of the summons provided only a partial answer, and one capable of easy abuse. The summons in *Barter Systems, Inc.* sought books and records containing "[a]ll members' names and account numbers," information on "[e]xchange members transactions," and "[a]ll monthly account statements for each exchange member." 694 F.2d at 165. Under these circumstances, a simple statement that the summons was issued only with respect to Barter Systems, Inc.'s tax liability ignores both the purpose and the substance of the summons. The decision of the Eighth Circuit attempts to resolve any conflict between section 7609(f) and Code § 7602 by relying on the words that appear on the face of the summons. This kind of mechanistic approach to the conflict overlooks the importance of section 7609(f), an importance which is clearly described in the legislative history, discussed below.

C. The Legislative History Of Section 7609(f) Confirms The Literal Meaning Of The Statute And The Need To Accommodate The Investigatory Power Of The IRS With The Congress's Directive On John Doe Summonses.

1. *Restrictions on IRS investigations are rarely imposed.*

It is not often that the Congress imposes restrictions on the IRS's investigatory authority. Generally, the IRS is free to wield its investigatory powers without seeking permission from, or answering to, anyone. It can place any taxpayer whom it chooses under audit at any time that it chooses, and it can serve summonses wherever it deems it necessary. And even when the Service is called upon to justify its actions in court, the only limitations Congress has placed on it, besides the third party summons rules at issue in this case, are that the information sought by the IRS be "relevant or necessary" to an audit (Code § 7602(a)), that a taxpayer be audited only once unless a second audit is necessary (Code § 7605(b)), that a taxpayer be given at least 10 days to comply with a summons (Code § 7605(a)), and that no administrative summons be served on a taxpayer once the Justice Department has recommended a criminal investigation (Code § 7602(c)). Most of these restrictions on the Service have been in the tax statutes since 1939 or earlier. Apart from the restrictions relating to criminal investigations, the third party summons rules were the first restrictions placed on IRS investigations in more than 37 years. Congress did not intend that the John Doe summons rules be taken lightly or that they become inapplicable merely because a summons is served on a record keeper while under audit.

2. *The Congress' intent.*

The history of section 7609 begins with a decision of this Court. In *United States* v. *Bisceglia*, 420 U.S. 141, 95 S.Ct. 915, 43 L.Ed.2d 88 (1975), the Court held that, under the law at that time, the IRS had the authority to serve a John Doe summons, as long as it was not engaged in a fishing expedition. Section 7609(f) was enacted in response to this decision. See the *General Explanation of the Tax Reform Act of 1976*, Prepared by the Staff of the Joint Committee on Taxation, December 29, 1976 (hereinafter, "*General Explanation*"), at 364 (reproduced at 1976-3 (Vol. 2) Cum. Bull. 376), which refers specially to *Bisceglia* as the authority for the IRS power which section 7609(f) was designed to curb. Congress was clearly concerned about the use of that power. The *General Explanation* provides, at 364-365, 1976-3 (Vol. 2) Cum. Bull. 376-377 (emphasis supplied):

> The use of the administrative summons, including the third-party summons, is a necessary tool for the IRS in conducting many legitimate investigations concerning the proper determination of tax. The administration of the tax laws requires that the Service be entitled to obtain records, etc., without an advance showing of probable cause or other standards which usually are involved in the issuance of a search warrant. On the other hand, the use of this important investigative tool should not unreasonably infringe on the civil rights of taxpayers, including *the right to privacy*.
>
> Even prior to the enactment of this provision, the Service had instituted an administrative policy designed to establish certain safeguards in this area. Under this policy, IRS representatives were instructed to obtain information from taxpayers and third parties on a voluntary basis where possible. Where a third-party summons is [sic] served, advance supervisory approval was required. In the case of a John Doe summons, the advance supervisory approval was required to be obtained on a high level basis. The Congress decided, however, that

> these administrative changes, while commendable, do not fully provide all of the safeguards which might be desirable *in terms of protecting the right of privacy*.

And while seeking to preserve the use of the John Doe summons, Congress desired to assure that it was not used to conduct fishing expeditions:

> While the Congress believes it is important to preserve the John Doe summons as an investigative tool which may be used in appropriate circumstances, at the same time, the Congress does not intend that the John Doe summons is to be available for purposes of enabling the Service to engage in a possible "fishing expedition." For this reason, the Congress intends that when the Service does seek court authorization to service [sic] this type of summons, it will have specific facts concerning a specific situation to present to the court.

General Explanation, at 369-370, 1976-3 (Vol. 2) Cum. Bull. at 381-382.

In enacting section 7609(f), Congress demonstrated the utmost concern for the privacy rights of the citizenry. It referred to those rights repeatedly. *See also* H. Rept. 94-658, 94th Cong., 1st Sess., at 306-312, 1976-3 (Vol. 2) Cum. Bull. 998-1004. In deference to those rights, Congress imposed a narrow but important limitation on the Service's ability to cond ct investigations.

It was appropriate that Congress, in its wisdom, should be concerned about IRS invasions of privacy. Other laws enacted by Congress, and decisions of this Court interpreting those laws, have accorded the IRS greater and broader powers than any other institution in the United States to inquire in depth into the most intimate financial and personal details of every citizen. *See, e.g., United States* v. *Powell*, 379 U.S. 48, 57-58 (1964). No other

government agency has such power. Congress did not take that power away from the IRS when it enacted section 7609(f). Instead, it said that if the IRS wants to apply that power to people whose identities are not even known to it at the time, first it has to justify its actions in a court of law. It has to seek *ex parte* court approval prior to issuing a John Doe summons. Given the scope of the Service's authority and the ease of the *ex parte* procedure, this limitation is a small one indeed. But its importance is not to be overlooked. Congress did not expect that limitation to be circumvented by a procedure as simple as putting a record keeper under audit—*particular when the record keeper can be put under audit at any time by the very institution upon which Congress was imposing the limitation.*

The IRS as an institution even appears to expect that, when a tax shelter promoter is under audit, the agent will use a John Doe summons to obtain its client list. One of the responsibilities of the District Office under the Service's Tax Shelter Program is to

> assure that, before a John Doe summons is sought against a promoter, a project has been established with respect to the particular shelter promotion involved and the Service will be moving to investigate investors involved in the schemes.

IRM § 42(17)2.3(3) (*CCH* at 7347-32).

The legislative history of section 7609(f), and the Service's apparent understanding of it, thus confirm the plain meaning of the statute: when the IRS serves a summons seeking the identities of unknown taxpayers, section 7609(f) applies. It is the protection which Congress specifically and intentionally placed between the IRS and unknown targets of IRS summonses. Agent Lewis did not follow the procedures required by section 7609(f), and the

summonses he served should therefore be quashed or limited in scope.

D. Due process requires compliance with section 7609(f).

Requirements of due process also mandate that the Service follow the procedure set forth in section 7609(f) prior to issuing summonses such as those served on Tiffany. In *Hannah* v. *Larche*, 363 U.S. 420, 80 S.Ct. 1502, 4 L.Ed.2d 1307 (1960), this Court described the due process balancing test as follows:

> "Due process is an elusive concept. Its exact boundaries are indefinable, and its content varies according to specific contexts . . . Therefore as a generalization, it can be said that due process embodies the differing rules of fair play, which through the years have become associated with differing types of proceedings. Whether the Constitution requires that a particular right obtain in a specific context depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding and the possible burden on that proceeding, are all considerations which must be taken into account.

363 U.S. 441-442.

The principle of "rules of fair play" described in *Hannah* v. *Larche* requires the Service's compliance with section 7609(f) in this case. The "nature of the right involved" is the right of privacy of unknown taxpayers and their freedom from unwarranted intrusion by the IRS—a significant right which deserves this Court's recognition and which, in fact, the Congress has directed the courts to recognize. On the other hand, the nature of the proceeding provided by Congress for safe-guarding that right is not a difficult one—it is a simple *ex parte* proceeding in which determinations are made "solely on the petition

and supporting affidavits" of the government. Code § 7609(h)(2). Moreover, the government's burden in the proceeding is a light one. *See, e.g., In the Matters of Tax Liabilities of John Does*, 671 F.2d 977, 979 (6th Cir. 1982). In fact, the legislative history of section 7609(f) requires that this burden be light:

> [T]he Congress does not intend to impose an undue burden on the Service in connection with obtaining a court authorization to serve this type of summons. For example, the Service is not required to show that there is "probable cause". . . . It is enough for the Service to reveal to the court evidence that a transaction has occurred, or may have occurred, and that the transaction (in the context of such facts as may be known to the Service at that time) is of such a nature as to be reasonably suggestive of the possibility that the correct tax liability with respect to the transaction may not have been reported. . . .

General Explanation, at 370, 1976-3 (Vol. 2) Cum. Bull, at 382. It is hard to find a burden lighter than that. Finally, the ultimate consequences of a summons which seeks to identify unknown taxpayers should not be overlooked. It is almost certain that such a summons will result in an IRS investigation of the taxpayers, an investigation which could cost them dearly if the results are unfavorable and which, regardless of the outcome, will surely cost them time and money just to be unwilling participants. The "complexity of the factors" involved in such summonses requires the application of section 7609(f).

In the case before the Court, due process is provided only by the judicial review procedures set forth in section 7609(f). This due process protection cannot be evaded by the guileful drafting of a summons which simply names the putative record keeper as a target of the audit. Due

process requirements transcend the easy manipulation of the words on the face a summons to govern the substance of administrative or judicial process.

In this case, the targets of the IRS investigation are clearly unknown third-party taxpayers. The burden on the Service to comply with section 7609 is slight in contrast to the explicit intent of Congress to place such investigations under some judicial supervision. Under a due process balancing test, the scale tips clearly in favor of enforcing the procedure set forth in section 7609(f).

E. The Deferential Standard Accorded To The Service's Summons Authority Is Not Applicable With Respect To The Summonses In This Case Because It Is The Courts' Own Authority Which Is At Issue And Because The Circumstances Under Which Deference Is Accorded The IRS Are Not Present.

1. *The courts' authority.*

In *United States* v. *Gottlieb*, 712 F.2d 1363 (11th Cir. 1983), the Eleventh Circuit avoided a statutory analysis of section 7609(f). *Gottlieb*, like *Barter Systems, Inc.*, *supra*, involved a barter exchange which was under audit, and a general summons seeking the identities of exchange members. The Eleventh Circuit ordered the enforcement of the summons under the rationale that "a deferential standard must be applied when construing congressional intent regarding the scope of the IRS's summons authority." 712 F.2d at 1368. In the case before the Court, the Second Circuit used the same rationale. 718 F.2d at 13. On many occasions, this Court has applied a deferential standard when construing Congressional intent regarding the scope of the Service's summons authority. This rule is described in *United States* v. *Euge*,

444 U.S. 707, 100 S.Ct. 874, 63 L.Ed.2d 141 (1980), as follows:

> [I]f the summons authority claimed is necessry for the effective performance of Congressionally imposed responsibilities to enforce the tax Code, that authority should be upheld absent express statutory prohibition or substantial countervailing policies.

444 U.S. at 711.

The application of the deferential standard described in *Euge* is wholly inappropriate in this case. In *Euge*, only Code § 7602 was being interpreted. The Court was determining whether, under Code § 7602, the Service had the investigatory authority that it claimed to have. That issue was resolved, altogether appropriately, under the deferential standard rule.

In the case before the Court, the issue is whether the John Doe summons procedures of section 7609(f) apply—and the most important aspect of the section 7609(f) procedures is the requirement that a court approve the summons before it is served. A resolution, therefore, of whether section 7609(f) applies is also a resolution of the scope of the courts' authority to review IRS summonses before they are issued. It is not just the Service's authority that is at issue in this case. It is the courts' authority, as well. If this Court holds that section 7609(f) does not apply to summonses such as those served on Tiffany, it will also hold that the federal courts have no pre-issuance authority over such summonses. The Court may prove inclined to so decide, but to make that decision based on the deferential standard is to say, not just that the Service's authority must be liberally construed, but that the courts' authority must be narrowly construed because the Service's powers are so great. That is an extension of the deferential standard far beyond what this Court intended

in *Euge*. Indeed, since section 7609(f) empowers federal courts to review the propriety of John Doe summonses, it is tantamount to a jurisdictional statute and should be "construed both with precision and fidelity to the terms by which Congress has expressed its wishes." *Chang Fan Kwok* v. *Immigration Service*, 392 U.S. 206, 88 S.Ct. 1970, 20 L.Ed.2d 1037 (1968). *See also, Palmore* v. *U.S.*, 411 U.S. 389, 93 S.Ct. 1670, 36 L.Ed.2d. 342 (1973).

2. *The Circumstances Under Which The Deferential Standard Is Applied.*

Even if the courts' authority were not at issue in this case, it would be inappropriate to apply a deferential standard in interpreting section 7609(f). The Court's description in *Euge* of when that deferential standard is used shows why the rule is inappropriate here.

The issue in *Euge* was whether, under its summons authority, the IRS could require a taxpayer to furnish hand-writing exemplars so that the Service could determine whether the taxpayer maintained several bank accounts under other names. In *Euge*, the IRS agent found several bank accounts which he suspected belonged to the taxpayer because the account statements were sent to post office boxes held in his name and because the signature cards for the accounts listed addresses of properties which he owned. The only statute being interpreted in *Euge* was Code § 7602, and the Court, in upholding the Service's authority, stated (444 U.S. at 711):

> The authority claimed here is necessary for the effective exercise of the Service's enforcement responsibilities; it is entirely consistent with the statutory language; and it is not in derogation of any constitutional rights or countervailing policies enunciated by Congress.

The facts and law surrounding the *Euge* decision are a far cry from the case presently before the Court. The summons authority claimed by the IRS in this case, while it may assist the IRS in the performance of one Congressionally imposed responsibility, runs exactly counter to another Congressionally imposed responsibility—to use the John Doe summons procedures when the summons seeks the identities of unknown taxpayers. Moreover, in *Euge*, there was no express statutory prohibition on the IRS's exercise of the authority it claimed. In the case before the Court, section 7609(f) does contain an express limitation. Also, in *Euge* there was no substantial countervailing policy that weighed against the Service's claimed authority. But here there is a policy—a policy created by the Congress itself in recognition of taxpayers' rights of privacy. Finally, in *Euge*, the agent knew exactly what he needed in order to perform his responsibilities. For him, the handwriting samples were the next logical step in his investigation and, no doubt, a necessary step. In the present case, Agent Lewis has yet to see one page of Tiffany's books and records and cannot possibly know what information he needs to audit Tiffany. If his enforcement responsibilities presently include only the audit of Tiffany, it is uncertain whether the authority he claims is at all necessary for the effective exercise of those responsibilities.

The deferential standard accorded the IRS's investigatory powers was also described in *United States* v. *Bisceglia, supra*. In *Bisceglia*, decided before the enactment of section 7609(f), the issue was whether the IRS had the authority to issue a John Doe summons. The Court ruled that, subject to the *Powell* standards *(United States* v. *Powell, supra)*, it did: "Settled principles of statutory interpretation require that we avoid [a result which frustrates broad IRS inquiries] absent unambi-

guous directions from Congress." 420 U.S. at 150. Of course, Congress provided those directions when it enacted section 7609(f). It said, in effect, that the IRS cannot issue John Doe summonses without first complying with the requirements of section 7609(f)—plain, unambiguous directions.

Are these directions to be so easily circumvented through the use of a summons served on a record keeper who was just placed under audit? That is the issue before the Court. But it is not to be resolved under a deferential standard test. The "deferential standard" has been developed in cases entirely different from the case before the Court and, indeed, the language in which that test is expressed does not cover this case at all. The authority claimed by the IRS in this case is inconsistent with the statutory language of section 7609(f), may not be necessary to the IRS to exercise its responsibilities, and is in substantial derogation of a countervailing policy clearly enunciated by Congress. This Court, it is hoped, is to decide what section 7609(f) means, but not by examining it in a light which accords deference to the IRS.

F. Analogies To Summonses Issued During Civil/Criminal Investigations Are Inappropriate.

In upholding enforcement of the summonses in the present case, the Second Circuit Court of Appeals compared the summonses to those served in the course of an IRS investigation which is both civil and criminal in nature, and noted that such summonses were enforced as long as the Service had not abandoned the civil aspects of the case. 718 F.2d 13. It cited two decisions of this Court: *United States* v. *LaSalle National Bank*, 437 U.S. 298, 98 S.Ct. 2357, 57 L.Ed.2d 221 (1978), and *Donaldson* v. *United States*, 400 U.S. 517, 91 S.Ct. 534, 27 L.Ed.2d 580

(1971).[3] However, this analogy to civil/criminal investigations is inappropriate to the kind of investigation being conducted in this case and it results in an undermining of section 7609(f) which is unnecessary.

The rationale of *LaSalle National Bank* and *Donaldson* is a sensible one. If a summons could be quashed merely because the Service was interested in discovering possible criminal conduct by the taxpayer, no meaningful investigation of the taxpayer's civil liability could proceed. *See United States* v. *Powell*, *supra*, 420 U.S. at 150. The Service would have no alternative means of obtaining information relevant to the civil tax investigation. The investigation of the taxpayer would effectively be over. Moreover, the taxpayer suspected of criminal conduct would obtain greater protection from investigation than would a taxpayer who was not suspected of committing any criminal acts.

No such anomalies arise if the Service is required to comply with section 7609(f) when the summons is designed to identify unknown taxpayers. The consequence of quashing a summons for failing to comply with section 7609(f) is much less significant than the consequence of quashing a summons in an investigation that is partially criminal in nature. If a summons is quashed because the Service has failed to comply with section 7609(f), the Service has at least two options available to it. It may either proceed to satisfy the requirements of section 7609(f), or it may narrow the scope of its summons to

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[3] The holding in these cases has been superseded by the enactment of Code § 7602(c), which prohibits the issuance of a summons after a criminal recommendation has been made by the Department of Justice.

demand under section 7602 that portion of the information which does not identify unnamed taxpayers. Such a compromise is exactly what Tiffany offered in this case. JA 18a. Either way, the investigation continues.

Section 7609(f) is clearly intended to impose some limitation on the unfettered authority of the Service to investigate unnamed taxpayers. The recognition of this limitation does not limit the authority of the Service to investigate the taxpayer served with the summons, as the Court feared in the line of civil/criminal summons cases. Quashing the summonses in this case will not prevent the Service from conducting a complete audit of Tiffany or any other named taxpayer. (As a practical matter, the Service rarely requires the identities of clients in order to audit a taxpayer, anyway (except, perhaps, in an all-cash business).) If the Service chooses not to comply with the provisions of section 7609, it may nevertheless proceed with its audit of Tiffany with all the other available information. If, during the audit, the Service concludes that it cannot complete the audit without the names of Tiffany's clients, the Service may, at that point, seek an order to produce such records in accordance with section 7609(f).[4] As discussed below, the Service might have even obtained these records under Code § 7602 had it followed its own audit procedures.

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[4] It is not uncommon to require the Service to establish that it cannot complete the audit without the appropriate third party information prior to permitting it to obtain additional information. The Court of Appeals for the First Circuit has adopted such a two step process for taxpayer discovery purposes. *United States* v. *Salter*, 432 F.2d 697 (1st Cir. 1970).

G. The Applicability Of Section 7609(f) Does Not Restrict The Service's Ability To Audit The Record Keeper As Long As It Conducts Its Audits Properly.

The legislative history of section 7609(f) shows that the Sixth Circuit's common-sense interpretation in *United States* v. *Thompson* of the plain meaning of the statute is the better interpretation. The question—what was the purpose of the summons—must be confronted in a fashion which gives meaning to the intent of Congress and the language of the statute. And if a purpose of the summons was to obtain identities of unknown taxpayers, then Congress's concern in enacting section 7609(f) cannot be ignored. Section 7609(f) must apply.

In *United States* v. *Gottlieb*, *supra*, the Eleventh Circuit supported its decision to the contrary by reasoning that, if the IRS could not have the members' identities under a John Doe summons, then it would be unable to obtain such information at all—a result which impeded in an unacceptable manner its authority to investigate the barter exchange. The Court stated:

> "In other words, the IRS must have an independent right to obtain third-party recordkeeper's records for purposes of auditing the recordkeeper. Under such circumstances, where the IRS could obtain the records in any event without regard to whether the § 7609(f) requirements were met, it would be meaningless to impose the § 7609 requirements in the first instance."

712 F.2d at 1369.

Following this rationale, one might also ask, Why have section 7609(f) at all? If the Service can always get clients' identities by placing the record keeper under audit, section 7609(f) becomes hollow law—words without substance—which might as well be judicially excised

from the statute. Such judicial excision, however, is hardly possible in light of the language of the statute and the importance ascribed to it by the legislative history. In any event, the dilemma described by the Eleventh Circuit is not a dilemma at all—other than one of the Service's own making.

The Service did not have to find itself in the predicament the court in *Gottlieb* fears. Had it commenced an orderly audit of Tiffany, examined the company's journal, ledger and other records, and then concluded that it was necessary to contact Tiffany's clients in order to complete the audit of Tiffany, this case would not be under consideration today. That, after all, is how the IRS, according to its own manual, is supposed to conduct audits.

Auditing procedures and techniques for agents are contained in the Manual publication "Tax Audit Guidelines for Partnerships, Estates and Trusts, and Corporations," Manual Transmittal 4233 (*CCH* at 7281) (hereinafter referred to as "the Guidelines"). Chapter 200 of the Guidelines contains "Audit Techniques for Business Returns." It states (Section 210, *CCH* at 7281-11):

> The examination at the taxpayer's office may begin with miscellaneous records other than the actual ledgers and journals. Frequently, these records indicate items which the examiner should be alert for as the examination progresses.

The "miscellaneous records" the Guidelines refer to include the corporate minute book, any audit reports of independent auditors, the stock transfer book, financial statements for credit purposes, and appraisals.

The Guidelines then suggest that the agent proceed to:

(i) examine the general ledger (Section 220, *CCH* at 7281-12);

(ii) reconcile the differences between the net income on the books and the net income on the tax returns (Section 221.1, *CCH* at 7281-13);

(iii) review cash disbursements (Section 231.2, *CCH* at 7281-15); and

(iv) examine notes and accounts receivable (Section 231.3, *CCH* at 7281-15 - 7281-16).

The Service itself clearly expects its agents to get an overview of the company under audit before seeking specific documents other than the standard books of accounts. Had Agent Lewis followed his own manual, this matter would not be before the Court. Tiffany would be hard-pressed to demonstrate that the IRS served the summonses in order to circumvent section 7609(f). Tiffany might have attempted to show that it was not necessary for the IRS to have its entire client list, or at least some portion of it, and the summonses might have been limited based on that ground, *see United States* v. *Bisceglia*, *supra*, but Tiffany would not have been able to make a credible argument that the Service was trying to circumvent section 7609(f). It is the manner in which the Service has proceeded that raises doubts about its true purpose—and rightfully so.

The Eleventh Circuit's rationale in *Gottlieb* presumes that the Service's purpose in serving the Code § 7602 summons was a legitimate one. But if the Service's purpose in serving the summonses on Tiffany was to obtain the identities of its clients, then it should have proceeded under section 7609(f), and its Code § 7602 summons was *not* served pursuant to a legitimate purpose. *Powell*, *supra*. When, as in the case before the Court, the Service had adopted an institutional posture to audit people such as Tiffany's clients and when, as here, the Service, con-

trary to its own audit procedures, starts the audit of the record keeper by asking for a list of those clients, the Service on its own raises doubts as to the legitimacy of its purpose. At that point, the only way to preserve the integrity of section 7609(f) is to deny the Service the information protected by section 7609(f) unless it meets the John Doe requirements. If the Service cannot meet its section 7609(f) burden, then a question truly arises as to whether the record keeper was in fact put under audit in the first place so that section 7609(f) could be avoided. If that is the case, then the purpose of section 7609(f) is certainly defeated, unless the decision in *United States* v. *Thompson* is followed.[5]

H. The Potential For Abuse Of The Courts' Process Requires The Application Of Section 7609(f) To Summonses Such As Those Served On Tiffany Or, At The Least, An Examination Of Whether Section 7609(f) Should Apply In Certain Cases.

If section 7609(f) does not apply to summonses such as those served on tiffany, there is enormous potential for abuse of the courts' process in the enforcement of general summonses.

The legislative history of section 7609(f) makes one thing indisputably clear: Congress enacted section 7609(f) to curb the potential misuse of the John Doe summons process after this Court's decision in *United States* v. *Bisceglia*. Congress enacted section 7609(f) so that a

[5] One reason the Service might prefer the Code § 7602 summons is that the section 7609(f) procedures take more time and, while the Agent is awaiting internal IRS approval of the summons, statutes of limitations for the tax returns of the taxpayers sought to be identified may expire. This problem is also one of the Service's own making.

court would supervise the Service's use of such summonses. The *General Explanation* states, at 365, 1976-3 (Vol. 2) Cum. Bull. 377:

> In the case of a John Doe summons, advance notice to the taxpayer [such as that required by section 7609(a) where the identity of the taxpayer is known] is obviously not possible. Here the Congress decided that the IRS agent should be required to show adequate grounds for serving the summons in an independent review process before a court before any such summons can be served.

Congress expected the courts to assure that John Doe summonses were not used to conduct fishing expeditions:

> . . .[T]he Congress intends that when the Service does seek court authorization to serve this type of summons, it will have specific facts concerning a specific situation to present to the court.

General Explanation, at 370, 1976-3 (Vol. 2) Cum. Bull. at 382.

Congress envisioned a limited but important role for the courts:

> The Congress contemplates that the court will review each John Doe summons to be sure that the material requested is reasonably related to the investigation, and that the summons is not overly broad in terms of the records requested.

Id.

As a practical matter, any time that the IRS wants to obtain client lists, under *Barter Systems, Inc.*, *Gottlieb*, and the Second Circuit's decision in this case, it can avoid the requirements of section 7609(f) merely by initiating an audit of a record keeper such as Tiffany, however specious or superficial the audit may be. If it serves a general summons requesting client lists and the record

keeper refuses to comply, the IRS asks the court to enforce the summons under Code § 7604. It enlists the aid of the court's process. If the only true reason for initiating the audit was to avoid the section 7609(f) requirements, the IRS abuses the court's process when it asks it to enforce a summons which is designed to circumvent the section 7609(f) rules.

In cases upholding the IRS's investigatory powers, this Court has always tempered its decisions with language designed to assure that the courts not permit their process to be abused. In *United States* v. *Powell*, *supra*, the Court allowed the enforcement of a summons to obtain books and records for periods barred by the statute of limitations and it set down the *Powell* standards for IRS investigations. The Court also stated:

> Nor does our reading of the statutes mean that under no circumstances may the court inquire into the underlying reasons for the examination. *It is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused.* Such an abuse would take place if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation.

379 U.S. at 58 (emphasis supplied).

And in *United States* v. *Bisceglia*, *supra*, upholding the Service's authority to serve a John Doe Summons, the Court stated:

> We do not mean to suggest by this holding that respondent's fears that the § 7602 summons power could be used to conduct "fishing expeditions" into

the private affairs of bank depositors are trivial. However, as we have observed in a similar context:

> " 'That the power may be abused, is no ground for denying its existence. It is a limited power, and should be kept within its proper bounds; and, when these are exceeded, a jurisdictional question is presented which is cognizable in the courts.' " *McGrain* v. *Daugherty*, 273 U.S. 135, 166 (1927), quoting *People ex rel. McDonald* v. *Keeler*, 99 N.Y. 463, 482 (1885).

So here, Congress had provided protection from arbitrary or capricious action by placing the federal courts between the government and the person summoned. The District Court in this case conscientiously discharged its duty to see that a legitimate investigation was being conducted and that the summons was no broader than necessary to achieve its purpose.

420 U.S. at 150-151.

Section 7609(f) is the law, and it requires the courts to review John Doe summonses before they are served. The Service abuses the courts' process whenever it tries to avoid section 7609(f) with a general summons. The case before the Court strongly suggests that an attempt was made by the Service to circumvent the procedures of section 7609(f) by simply identifying the record keeper as an audit target. Tiffany alleges, without contradiction, that Agent Lewis initially asked for Tiffany's client list without even advising Tiffany that it was under audit. And even if Agent Lewis did advise Tiffany that it was under audit, he requested Tiffany's client list at the very beginning of an audit—before he had requested or looked at any of Tiffany's books and records. In fact, at the time, Agent Lewis knew so little about the company that he incorrectly thought that it sold lithographs. One has to wonder how Agent Lewis knew he would need Tiffany's

client list in order to audit Tiffany before he knew anything else about Tiffany except that it licensed Pedi-Pulsors.

If section 7609(f) does not under any circumstances apply to summonses such as these, the opportunity for abuse is apparent and real. At the least, the courts should inquire into the true purpose of the summons—if only to prevent themselves from being an instrument of an effort to circumvent section 7609(f). *Powell* would appear to mandate such an inquiry. The first rule of *Powell* is that an IRS investigation be conducted pursuant to a legitimate purpose. The purpose of obtaining identities of unknown taxpayers is not a legitimate purpose of a Code § 7602 summons. If the summons was served for that purpose, it cannot be enforced. The only way for the court to determine the purpose of the summons is to inquire into whether, in substance, it is a John Doe summons covered by section 7609(f).

CONCLUSION

For the reasons stated above, the decision of the Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

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Office-Supreme Court, U.S.
FILED
JUN 18 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1007

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

TIFFANY FINE ARTS INC., *et. al.*,
Petitioners-Appellants,

v.

UNITED STATES OF. AMERICA, *et. al.*,
Respondents-Appellees.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

---

JOINT APPENDIX

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TABLE OF CONTENTS

		Page
1.	Relevant docket entries—U.S. District Court, Southern District of New York	1a
2.	Relevant docket entries—U.S. Court of Appeals Second Circuit	3a
3.	Summonses served on Tiffany Fine Arts, Inc., and Subsidaries	4a
4.	Order to show cause, District Court	8a
5.	Verified Petition to Enforce Internal Revenue Service Summons	10a
6.	Affidavit of (Revenue Agent) Joel Lewis	14a
7.	Affidavit (of Tiffany officer) in Opposition to Order to Show Cause	16a
8.	Supplemental Affidavit (of Revenue Agent Joel Lewis)	21a
9.	Transcript of hearing on Order to Show Cause	26a
10.	Order of U.S. District Court	38a
11.	Decision of U.S. Court of Appeals for the Second Circuit—Reference to Petitioners' Petition for Certiorari	40a

1. Relevant docket entries, U.S. District Court, Southern District of New York

PROCEEDINGS

11-9-82 — IN RE: USA AND JOEL LEWIS v TIFFANY FINE ARTS: Fld Memo of Petitioner in support OF THEIR VERIFIED PETITION TO ENFORCE AN INTERNAL REVENUE Service Summons.

11-09-82 — U.S.A. & JOEL LEWIS, IRS -VS- TIFFANY FINE ARTS, INC, ET AL: Fld. O.T.S.C., iss. ret. 11-23-82, at 10:00 Am. in Ct. Rm. 110, Part 1, to compel resp. to comply with IRS summons. . . . Cooper, J.

11-22-82 — IN RE: USA AND JOEL LEWIS v TIFFANY FINE ARTS: Fld Aff't In opposition to Order to show cause by the USA to enforce various summonses allegedly derived upon Tiffany Fine Arts et al, By president of Tiffany Fine Arts.

11-22-82 — USA NAD JOEL LEWIS v TIFFANY FINE ARTS: Fld Memo of law on behalf of Resp's motion to enforce the IRS summons.

11-26-82 — USA AND JOEL LEWIS v TIFFANY FINE ARTS: Fld supplemental aff't of Joel Lewis in support of the petition to enforce the IRS summons.

11-26-82 — USA and JOEL LEWIS v TIFFANY FINE ARTS: Fld Petitioner's reply memo of law in support of their verified petition to enforce an IRS summons.

11-26-82 — USA AND JOEL LEWIS v TIFFANY FINE ARTS: Fld Order that resp shall comply fully with the IRS summons served upon them on 10-6-81. So Ordered BRODRICK J. Dated 11-24.

12-7-82 — USA and JOEL LEWIS V. TIFFANY FINE ARTS, INC. Fld. ORDER TO SHOW CAUSE ret. December 13, 1982 at 9:00 a.m. or as soon as counsil can be heard, with a stay of an order issued on November 24, 1982, enforcing a summons by the IRS SHOULD NOT ISSUE PENDING RESOLUTION OF AN APPEAL OF SAID ORDER, AND IT IS FURTHER ORDERED that personal service on the peitioner of a copy of this order and the papers shall be

serviced by December 10, 1982 by 5:00 p.m... Judge Broderick.

12-8-82 — USA AND JOEL LEWIS v TIFFANY FINE ARTS: Fld Notice of Appeal that Tiffany Fine Arts hereby appeal the U.S. Court of Appeals from the order of the U.S.D.C. Southern District enforcing an IRS summons against Resp entered on the 24th day of November. By Atty for Resp.

12-14-82 — USA and JOEL LEWIS V. TIFFANY FINE ARTS, INC: Fld. MEMO ENDORSED on OTSC RET. Dec. 13, 1982, with PETTIION MEMORANDUM OF LAW and transcript dated Nov. 24, 1982, that APPLICATION GRANTED. Respondent and Petitioners to submit order which memoralized various stipulations as to statute of limitation expedition, etc. Judge Broderick.

1-18-83 — USA & JOEL LEWIS V. TIFFANY FINE ARTS INC: Fld. Order that respondent having moved, by order to show cause dated 12-7-82, for a stay of an order of this court, dated 11-24-82, enforcing certain IRS Summonses served on 10-6-1982. It is hereby Ordered that said Application is granted. That the execution of the District Court order directing petitioner's summons served 10-6-81, is stayed pending the hearing. That respondents execute such IRS form 872 waivers as are at least sufficient to supend, etc. That the respondent will join in and consent to the petitioners' request for an expedited appeal; and that the respondent will perfect the docketing of their appeal herein promptly and in no event later than Dec. 17, 1982. IT IS SO ORDERED . . . Judge Broderick.

2. Relevant docket entries, U.S. Court of Appeals, Second Circuit

FILINGS—PROCEEDINGS

12-09-82 — Copy of district court docket entries and notice of appeal on behalf of Appellant Tiffany Fine Arts, et al. filed.

1-31-83 — Appellant Tiffany Fine Arts, et al. brief filed. (w/ pfs)

1-31-83 — Appellant Tiffany Fine Arts, et al appendix filed. (w/pfs)

02-18-83 — Appellee USA et al page proofs of briefs w/pfs filed.

02-22-83 — Appellee USA et al briefs w/pfs filed.

03-07-83 — Appellant Tiffany Fine Art, In et al reply briefs w/pfs filed.

3-28-83 — Case argued before: Kearse, Pierce, Pratt CJJ

9-13-83 — Judgment affirmed by published opinion filed (Pratt)

9-13-83 — Judgment filed

9-27-83 — Appellants Tiffany Fine Art, Inc., et al., petition for rehearing with a suggestion for rehearing in banc filed. (w/pfs)

10-28-83 — Order denying appellants Tiffany Fine Art, Inc, et al., petition for rehearing with a suggestion for rehearing in banc filed.

11-4-83 — Appellants Tiffany Fine Arts, et al. motion to stay mandate pending application to the Supreme Court for writ of certiorari w/pfs filed.

11-21-83 — Order granting Appellants' Tiffany Fine Arts, Inc. stay of mandate pending application for writ of certiorari filed (endorsed on motion filed 11/4/83) ALK; LWP; GCP

EDITOR'S NOTE

PAGES 4a through 7a WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

3. Summonses served on Tiffany Fine Arts Inc. and subsidiaries

Form 2039-C (Rev. Jan. 1981)

Summons

Department of the Treasury
Internal Revenue Service

In the matter of the tax liability of Tiffany Fine Arts Inc. & Subsidiaries

Internal Revenue District of Brooklyn Periods 7910 & 8010

The Commissioner of Internal Revenue

To Steven Hofstein, as President of Tiffany Fine Arts Inc.

At 545 Madison Avenue, New York, New York 10022

You are hereby summoned and required to appear before Joel Levin

an officer of the Internal Revenue Service, to give testimony relating to the tax liability or the collection of the tax liability of the person identified above for the periods shown and to bring with you and produce for examination the following books, records, papers, and other data:

(1) All books, papers, records and other data pertaining to the operation of Tiffany Fine Arts Inc and subsidiaries (including World Medical Marketing Corp.) for the periods ending October 31, 1979 and October 31, 1980, including but not limited to the following specific records: general ledger, sales journal, purchase book, cash receipts book, cash disbursement book, cancelled checks and bank statements, workpapers, sales contracts, and purchase invoices for the above described periods.

(2) A list of the names, addresses, social security and employer identification numbers for all individuals, partnerships, estates, trusts and corporations who acquired Tiffany Fine Arts Inc., World Medical Marketing Corporation Inc., World Medical Marketing Corporation, World Video Corporation or any other subsidiary corporation of Tiffany Fine Arts Inc.

(3) A list of the names, addresses, social security and employer identification numbers for all individuals, partnerships, estates, trusts and corporations who acquired lithographs from Tiffany Fine Arts Inc.

(b) A list of the names, addresses, social security and employer identification numbers for all individuals, partnerships, estates, trusts and corporations who acquired any asset, distributorships etc. from Tiffany Fine Arts Inc., World Medical Marketing Corporation, World Video Corporation or any other subsidiary corporation of Tiffany Fine Arts Inc.

Business address and telephone number of Internal Revenue Service officer named above:

114 Old Country Road, Mineola, New York 11501 Tel: (516) 294-5719

Place and time for appearance:

at 114 Old Country Road, Mineola, New York 11501

on the 21 day of October 19 81 at 10 o'clock A M.

Issued under authority of the Internal Revenue Code this 6 day of October, 19 81

Joel Levin — Signature of Issuing Officer

Internal Revenue Agent — Title

Signature of Approving Officer (if applicable)

Title

Part C — To be given to noticee

Form 2039-C (Rev. 1-81)

4a

Form 2039
(Rev. Jan. 1961)

Summons

Department of the Treasury
Internal Revenue Service

In the matter of the tax liability of Tiffany Fine Arts Inc. & Subsidiaries

Internal Revenue District of Brooklyn Periods 7910 & 8010

The Commissioner of Internal Revenue

To [illegible] Secretary of Tiffany Fine Arts Inc.

At 545 Madison Avenue, New York, New York 10022

You are hereby summoned and required to appear before Joel Lewis
an officer of the Internal Revenue Service, to give testimony relating to the tax liability or the collection of the tax liability of the person identified above for the periods shown and to bring with you and produce for examination the following books, records, papers, and other data:

(1) All books, papers, records and other data pertaining to the operation of Tiffany Fine Arts Inc and subsidiaries (including World Medical Marketing Corp.) for the periods ending October 31, 1979 and October 31, 1980, including but not limited to the following specific records: general ledger, sales journal, purchase book, cash receipts book, cash disbursement book, cancelled checks and bank statements, workpapers, sales contracts, and purchase invoices for the above described periods.

(2) A list of the names, addresses, social security and employer identification numbers for all individuals, partnerships, estates, trusts and corporations who acquired: Pedi-Pulsor distributorships from World Medical Marketing Corporation Inc., World Medical Marketing Corporation, World Video Corporation or any other subsidiary corporation of Tiffany Fine Arts Inc.

(3) A list of the names, addresses, social security and employer identification numbers for all individuals, partnerships, estates, trusts and corporations who acquired lithographs from Tiffany Fine Arts Inc.

(4) A list of the names, addresses, social security and employer identification numbers for all individuals, partnerships, estates, trusts and corporations who acquired any asset, distributorship etc. from Tiffany Fine Arts Inc., World Medical Marketing Corporation, World Video Corporation or any other subsidiary corporation of Tiffany Fine Arts Inc.

Business address and telephone number of Internal Revenue Service officer named above:

114 Old Country Road, Mineola, New York 11501 Tel: (516) 294-3719

Place and time for appearance:

at 114 Old Country Road, Mineola, New York 11501

on the 21 day of October 19 81 at 10 o'clock A M.

Issued under authority of the Internal Revenue Code this 5 day of October, 19 81

Joel Lewis — Internal Revenue Agent
Signature of Issuing Officer — Title

Signature of Approving Officer (if applicable) — Title

Original to be kept by IRS

Form 2039 (Rev. 1-61)

58

Form 2039-C
(Rev. Jan. 1981)

Summons

Department of the Treasury
Internal Revenue Service

In the matter of the tax liability of Tiffany Fine Arts Inc. and Subsidiaries

Internal Revenue District of Brooklyn Periods FYE 7910 & 8010

The Commissioner of Internal Revenue

To Peter Rosenthal, as President of World Medical Marketing Corp

At 545 Madison Avenue, New York, New York 10022

You are hereby summoned and required to appear before Joel Lewis
an officer of the Internal Revenue Service, to give testimony relating to the tax liability or the collection of the tax liability of the person identified above for the periods shown and to bring with you and produce for examination the following books, records, papers, and other data:

(1) All books, papers, records and other data pertaining to the operation of World Medical Marketing Corporation (a subsidiary of Tiffany Fine Arts Inc.) for the periods ending October 31, 1979 and October 31, 1980, including but not limited to the following specific records: general ledger, sales journal, purchase book, cash receipts book, cash disbursement book, cancelled checks and bank statements, work papers, sales contracts and purchase invoices for the above described periods.

(2) A list of the names, addresses, social security and employer identification numbers for all individuals, partnerships, estates, trusts and corporations who received Medi-Taler distributorships from World Medical Marketing Corporation. Also copies of the application for license that each signed by each licensee.

6a

Business address and telephone number of Internal Revenue Service officer named above:

114 Old Country Road, Mineola, New York 11501 Tel: (516) 294-3719

Place and time for appearance:

at 114 Old Country Road, Mineola, New York 11501

on the 21 day of October 19 81 at 10 o'clock A M.

Issued under authority of the Internal Revenue Code this 6 day of October, 19 81

Joel Lewis
Signature of Issuing Officer

Internal Revenue Agent
Title

Signature of Approving Officer (if applicable)

Title

Part C — To be given to noticee

Form 2039-C (Rev. 1-81)

Form 0 (1981)

Summons

Department of the Treasury
Internal Revenue Service

In the matter of the tax liability of TIFFANY FINE ARTS INC. AND SUBSIDIARIES

Internal Revenue District of Brooklyn Periods FYE 7910 & 8010

The Commissioner of Internal Revenue

To Janice Martinez, Custodian of World Medical Marketing Corp

At 545 Madison Avenue, New York, New York 10022

You are hereby summoned and required to appear before Joel Levis
an officer of the Internal Revenue Service, to give testimony relating to the tax liability or the collection of the tax liability of the person identified above for the periods shown and to bring with you and produce for examination the following books, records, papers, and other data:

(1) All books, papers, records and other data pertaining to the operation of World Medical Marketing Corporation (a subsidiary of Tiffany Fine Arts Inc.) for the periods ending October 31, 1979 and October 31, 1980, including but not limited to the following specific records: general ledger, sales journal, purchase book, cash receipts book, cash disbursement book, canceled checks and bank statements, workpapers, sales contracts and purchase invoices for the above described periods.

(2) A list of the names, addresses, social security and employer identification numbers for all individuals, partnerships, estates, trusts and corporations who acquired Pedi-Pulsor distributorships from World Medical Marketing Corporation. Also copies of the application for license fact sheet signed by each licensee.

73

Business address and telephone number of Internal Revenue Service officer named above:

114 Old Country Road, Mineola, New York 11501 Tel: (516) 294-3719

Place and time for appearance:

at 114 Old Country Road, Mineola, New York 11501

on the 28 day of October, 19 81 at 10 o'clock A M.

Issued under authority of the Internal Revenue Code this 5 day of October, 19 81

Joel A. Levis — Signature of Issuing Officer

Internal Revenue Agent — Title

Signature of Approving Officer (if applicable)

Title

Original to be kept by IRS

Form 2039 (Rev. 1-81)

4. Order to show cause, District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

M-18-304

UNITED STATES OF AMERICA and JOEL LEWIS,
Revenue Agent, Internal Revenue Service,
Petitioners,

v.

TIFFANY FINE ARTS, INC. and its subsidiaries,
including WORLD MEDICAL MARKETING CORP. and
WORLD VIDEO CORP.,
Respondents.

ORDER TO SHOW CAUSE

NOTICE: THIS IS A COURT ORDER WHICH REQUIRES YOU TO APPEAR IN PERSON IN ROOM 110, UNITED STATES COURTHOUSE, FOLEY SQUARE, NEW YORK, NEW YORK 10007 AT 10:00 A.M. ON November 23, 1982

U.S. DISTRICT COURT
FILED 11/9/82
OF NEW YORK

Upon the Petition, together with the exhibits attached thereto, including the affidavit of Joel Lewis of the Internal Revenue Service, and upon the motion of the Honorable John S. Martin, Jr., United States Attorney for the Southern District of New York:

IT IS ORDERED that the respondent appear before the United States District Court for the Southern District of New York, United States Courthouse, Foley Square, New York, New York, in Part One, Room 110 on November 23, 1982 at

10:00 A.M., to show cause why the respondent should not be compelled to testify and produce the books, records and other papers demanded in the Internal Revenue Service summons served upon the respondents on October 6, 1981 and annexed to the Petition as Exhibit B and

IT IS FURTHER ORDERED that a copy of this order together with the Petition and annexed exhibits be personally served upon the respondents by the United States Marshal, or, in the alternative, by an official of the Internal Revenue Service on or before November 16, 1982 and

IT IS FURTHER ORDERED that within five (5) days after service of copies of this order, the Petition and annexed exhibits upon them, the respondent and any intervening party shall file and serve a written response to the Petition, supported by appropriate affidavit(s), as well as any motions they desire to make. All motions and issues raised by the pleadings will be considered on the return date of this order. Only those issues raised by motion or brought into controversy by the responsive pleadings and supported by affidavit will be considered at the return of this order, and any uncontested allegation in the Petition will be considered admitted.

Dated: New York, New York
November 5, 1982

Irving Ben-Cooper
IRVING BEN-COOPER
United States District Judge
(PART ONE)

5. Verified Petition to Enforce Internal Revenue Service Summons

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

M-18-304

UNITED STATES OF AMERICA and JOEL LEWIS,
Revenue Agent, Internal Revenue Service,
Petitioners,

v.

TIFFANY FINE ARTS, INC. and its subsidiaries,
including WORLD MEDICAL MARKETING CORP. and
WORLD VIDEO CORP.,
Respondents.

VERIFIED PETITION TO ENFORCE INTERNAL REVENUE SERVICE SUMMONS

The United States of America and Joel Lewis, Revenue Agent, by their attorney, John S. Martin, Jr., United States Attorney for the Southern District of New York, allege on information and belief:

1. This is a proceeding brought under the authority of Sections 7402(b) and 7604 (a) of the Internal Revenue Code of 1954, 26 U.S.C. §§ 7402(b) and 7604(a), to enforce judicially an Internal Revenue Service summons.

2. The respondents Tiffany Fine Arts, Inc., and its subsidiaries, including World Medical Marketing Corp. and World Video Corp. (the "respondents"), are within the jurisdiction of this Court.

3. Petitioner, Joel Lewis, is employed as a Revenue Agent in the Office of the District Director of Internal Revenue, Brooklyn District, with a post of duty at 114 Old Country Road, Mineola, New York.

4. Petitioner, Joel Lewis, is conducting an investigation, one purpose of which is to ascertain the correctness of the consolidated corporate income tax returns filed by the respondents for the fiscal years ending October 31, 1979, and October 31, 1980, as is more fully set forth in the Revenue Agent's affidavit, annexed as Exhibit A.

5. The respondents are in possession or control of books, records and other papers or have knowledge relating to the subject of the petitioners' investigation.

6. On October 6, 1981, Internal Revenue Service summonses, copies of which are annexed as Exhibit B, were duly issued directing the respondents to appear and to testify and produce for examination books, records and other papers more fully described in the summons. Copies of these summonses were served on respondents at the time and in the manner indicated on Exhibits B at page 2.

7. The books, papers, records or other data and information sought by the summonses are not in petitioners' possession.

8. The testimony and documents sought by the summonses may be relevant to and can reasonably be expected to cast light upon the subject of petitioners' investigation concerning the correctness of the aforementioned consolidated corporate income tax returns.

9. On October 19, 1981, Revenue Agent Lewis received a letter signed by the attorneys of respondent World Medical Marketing Corp. ("World"), Robson & Miller, which stated that the respondent World would not comply with the summonses served on it. The respondent World's failure to comply with the summonses continues to date, as is set forth in the attached affidavit, Exhibit A.

10. Neither respondent Tiffany Fine Arts, Inc., nor any of respondent's subsidiaries (other than World) objected to the summonses. In every case, there has been a failure to comply with the summonses and that failure continues to date as is set forth in the attached affidavit, Exhibit A.

11. It is the practice of this Court to proceed by Order to Show Cause in these matters.

12. No previous application has been made for the [remainder of sentence omitted in original].

WHEREFORE, the petitioners respectfully pray:

1. That this Court enter an order directing the respondents to show cause why the respondents should not comply with and obey the attached summonses;

2. That this Court enter an order directing the respondents to obey the summonses by ordering the production of the records called for by the terms of the summons before any proper officer of the Internal Revenue Service, at such time and place as hereafter may be fixed by such officer and by ordering the respondent to appear for the purpose of giving testimony; and

3. That this Court grant such other and further relief as it deems just and proper.

Dated: New York
November 5, 1982

JOHN S. MARTIN, JR.
United States Attorney for the
Southern District of New York
Attorney for Petitioner

By: Jamie Vincent Gregg
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Assistant United States Attorney
Office and Post Office Address
One St. Andrew's Plaza
Telephone: (212) 791-1970

VERIFICATION

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

JAMIE VINCENT GREGG, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of John S. Martin, Jr., United States Attorney for the Southern District of New York, attorney for the petitioners.

2. I have read the foregoing petition and believe it to be true.

3. The basis of my belief is the affidavit of Joel Lewis, as well as my review of the summonses which are the subject of this proceeding.

Jamie Vincent Gregg
JAMIE VINCENT GREGG
Assistant United States Attorney

Sworn to before me this
5th day of November, 1982

PATRICIA E. TOBIN
Notary Public, State of New York
No. [illegible in original document]
Qualified in Kings County
Commission Expires March 30, 1984

6. Affidavit of (Revenue Agent) Joel Lewis

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

M-18-304

UNITED STATES OF AMERICA and JOEL LEWIS,
Revenue Agent, Internal Revenue Service,
Petitioners,

v.

TIFFANY FINE ARTS, INC. and its subsidiaries,
including WORLD MEDICAL MARKETING CORP. and
WORLD VIDEO CORP.,
Respondents.

AFFIDAVIT OF JOEL LEWIS

JOEL LEWIS, being duly sworn, deposes and says:

1. I am employed as a Revenue Agent in the office of the District Director of Internal Revenue, with a post of duty at 114 Old Country Road, Mineola, New York. I submit this affidavit in support of the petition to enforce the Internal Revenue Service summons served upon the respondents in the above-entitled case.

2. In my capacity as a Revenue Agent, I am conducting an investigation, one purpose of which is to ascertain the correctness of the consolidated corporate income tax returns filed by Tiffany Fine Arts, Inc. ("Tiffany") and its subsidiaries, including World Medical Marketing Corp. ("World Medical") and World Video Corp. ("World Video") for the fiscal years ending October 31, 1979, and October 31, 1980. One aspect of my investigation into the correctness of Tiffany's consolidated corporate income tax returns concerns possible underreporting of income received and questionable business deductions claimed by Tiffany and its subsidiaries.

3. As part of the investigation, I issued IRS summonses on October 6, 1981, to respondent World Medical in care of Janine Martinelli, Secretary and Treasurer, and Peter Rosenthal, President, and to respondent Tiffany in care of Janine Martinelli, Secretary and Treasurer, and Steven Hofstein, President, directing them to appear before me to give testimony and to produce books, papers, records and other documents as set forth in the summons. Copies of the summonses are annexed to the Petition herein as Exhibit B.

4. The summonses were personally served on October 6, 1981.

5. By letter dated October 16, 1981, the respondents refused to comply with the summonses. A copy of the letter is attached to the Petition herein as Exhibit C.

6. The respondents did not appear on the return date of the summonses and have not otherwise complied with the summonses. The respondents' failure to comply continues to the date of this declaration.

7. The information sought by the summonses is not already in the possession of the IRS.

8. The testimony and documents sought by the summonses may be relevant to and can reasonably be expected to cast light upon the taxpayer's income tax liability for the years under investigation.

9. It is necessary to take the testimony and examine the books, papers, records, documents, and other data demanded by the summons to ascertain the correctness of the tax returns filed by the taxpayer for the years under investigation.

Joel Lewis
JOEL LEWIS
Revenue Agent

Sworn to before me
this 5th day of November, 1982.

JAMIE VINCENT GREGG
Notary Pubic of New York
[remainder of notary seal illegible in original]

7. Affidavit (by Tiffany Officer) In Opposition to Order to Show Cause

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Index No. M-18-304

UNITED STATES OF AMERICA and JOEL LEWIS,
Revenue Agent, Internal Revenue Service,
Petitioners,

v.

TIFFANY FINE ARTS, INC. and its subsidiaries,
including WORLD MEDICAL MARKETING CORP. and
WORLD VIDEO CORP.,
Respondents.

AFFIDAVIT IN OPPOSITION TO ORDER TO SHOW CAUSE

STATE OF NEW YORK)
) ss.
COUNTY OF NEW YORK)

STEVEN R. HOFSTEIN, being duly sworn, deposes and says:

1. I am the president of World Video Corp. ("World Video") and Tiffany Fine Arts, Inc. ("Tiffany"), respondents herein. I am fully familiar with the facts and circumstances had herein and submit this affidavit in opposition to the order to show cause brought by the United States of America to enforce various summonses allegedly served upon Tiffany and respondents World Medical Marketing Corp. ("World Medical") and World Video Corp. ("World Video").

2. Tiffany is a New York corporation which has acted as a holding company for various subsidiaries, including respondents World Medical and World Video since its incorporation in 1978. It has no employees and no officers other than the affiant.

During the relevant period herein, World Medical, a wholly owned subsidiary of Tiffany, was engaged in the licensing of a patented medical device to prevent the occurrence of thromboembolism. The device, entitled the Pedi-Pulsor, is designed to permit bed ridden patients to prevent deep vein thrombosis through leg movement assisted by the Pedi-Pulsor. (A description of the Pedi-Pulsor is annexed hereto as Exhibit A). During the years 1979 and 1980, World Medical sold approximately 50 to 100 licenses to certain persons who promoted the sales of Pedi-Pulsors in their licensed territories. By reason of the structure of the licensing program of the Pedi-Pulsor, licensees of World Medical received significant tax benefits for the years 1979 and 1980.

Primary Objective Of IRS Is To Obtain Names Of Pedi-Pulsor Participants

3. Upon information and belief, a Revenue Agent visited the premises of World Medical over one year ago to request a list of names, addresses and social security numbers of every Pedi-Pulsor licensees. The Agent was advised to contact Mort Robeson, Esq., World Medical's attorney, with any requests for information regarding World Medical. Mr. Robeson subsequently refused to furnish the Agent with a list of the Pedi-Pulsor licensees and so informed him by letter. Thereafter, the summonses were served upon Tiffany and World Medical ("Summonses"), although I did not learn of said Summonses until I was served with the moving papers herein. No summons was served upon World Video.

4. Based upon the Service's previous demand for the list of licensees it would appear quite clearly that the primary purpose of the IRS is not to audit Tiffany and its subsidiaries, but to obtain the names of the Pedi-Pulsor licensees. Tiffany has offered to produce to the IRS all its records. World Medical has offered to produce all its records with the names of the licensees redacted. World Medical has even offered to permit the IRS to randomly check certain of the names to insure their accuracy; but this offer has been rejected by petitioner. The

focus of the Summonses is, allegedly, the tax liability of Tiffany, the parent of World Medical. To affect a complete audit, all records have been offered except the wholesale delivery to petitioner of the respondents' list of participants.

5. The Service's true motive herein is to ascertain and audit the tax returns of respondents' clients, not respondents thereunder. This is evident from the face of the Summons. The Summons issued by the Service requests identification of those persons who bought "lithographs" from taxpayer Tiffany Fine Arts, Inc. "Lithograph tax shelters" are one kind of business venture which the Service has singled out for special audit. *See* IRM 42(17), Exhibit 42(17) 0-1 cited in IRM (CCH) at 7047-43. However, neither Tiffany nor any other corporation in taxpayers' consolidated group has ever sold or sells lithographs. The Service, in its zeal to audit persons who invest in lithographs or engage in other activities targeted by the IRS Tax Shelter Program, has simply assumed that Tiffany sells lithographs. The Service is on a blatant fishing expedition which cannot be condoned pursuant to I.R.C. § 7602.

6. The IRS is clearly able to conduct a complete audit of respondents' clients based upon the documents profferred. Its demand for a list of names, addresses, social security numbers of participants and the conduct of the Revenue Agent reveal without doubt that the primary purpose of the Summonses is to obtain the names of the respondents' clients. The IRS has given no substantive reason for requiring respondents to produce all their books and records to petitioner. The Revenue Agent states merely that "one purpose [of the summons] is to ascertain the correctness of the consolidated corporate returns . . . [including] underreporting of income received and questionable business deductions." Affidavit of Joel Lewis, sworn to on November 5, 1981, ¶ 2.

7. The unstated but obvious purpose of the Summonses is to obtain a list of respondents' clients under the guise of a general audit. Yet, as is clearly set forth in the accompanying memorandum of law, petitioner may obtain such information

only by satisfying the requirements of 26 U.S.C. § 7609(f). This it has failed to do. With respect to the list of participants, that part of the summons should be denied as petitioner has not complied with the statutory requirements of the Internal Revenue Code.

World Video Was Never Served With An IRS Summons

8. This proceeding should be dismissed with respect to World Video as it was never served with any of the Summonses petitioner seeks to enforce herein. Each of the Summonses annexed as Exhibit B to the verified petition of Jamie Vincent Gregg, sworn to on November 5, 1982 ("Petition") and annexed hereto as Exhibit B is addressed either to Tiffany or World Medical. World Video does not appear as a summoned party. Thus it follows that the enforcement proceeding against such party must be dismisseed. I.R.C. § 7604(b).

World Medical Was Never Served With The Moving Papers

9. The enforcement proceeding should also be dismissed with respect to World Medical as said corporation was never served with the moving papers herein. The Revenue Agent, Joel Lewis, served me personally with the moving papers. I told him I could not and would not receive service on behalf of World Medical. I was neither an officer nor an agent of said entity at the time. I resigned from my position at World Medical on October 1, 1979. (A copy of my resignation is annexed hereto as Exhibit C). Thus the proceeding cannot proceed against World Medical as petitioner has failed to obtain jurisdiction over said respondent for the purposes of this enforcement proceeding.

WHEREFORE, it is respectfully requested that this enforcement proceeding be dismissed.

Steven R. Hofstein
STEVEN R. HOFSTEIN

Sworn to before me this
19th day of November, 1982

David M. Rubin
DAVID M. RUBIN
Notary Public, State of New York
No. 31-4710620
Qualified in New York County
Term Expires March 30, 1984

8. Supplemental Affidavit (of Revenue Agent Joel Lewis)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

M-18-304

UNITED STATES OF AMERICA and JOEL LEWIS,
Revenue Agent, Internal Revenue Services,
Petitioners,

- against -

TIFFANY FINE ARTS, INC. and its subsidiaries,
including WORLD MEDICAL MARKETING CORP. and
WORLD VIDEO CORP.,
Respondents.

SUPPLEMENTAL AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF NEW YORK :
SOUTHERN DISTRICT OF NEW YORK)

JOEL LEWIS, being duly sworn, deposes and says:

1. I am employed as a Revenue Agent in the office of the District Director of Internal Revenue, with a post of duty at 114 Old Country Road, Mineola, New York. I submit this supplemental affidavit in support of the petition to enforce the Internal Revenue Services summons served upon respondents Tiffany Fine Arts, Inc. ("Tiffany") and its subsidiary, World Medical Marketing Corporation. ("World Medical").

2. As noted in my first affidavit, I am conducting an investigation, one purpose of which is to ascertain the correctness of the consolidated corporate income tax returns filed by Tiffany and its subsidiaries, including World Medical and World Video ("World Video") for the fiscal year ending October 30, 1979 and October 31, 1980.

3. One aspect of my investigation into Tiffany and its subsidiaries concerns the possible underreporting of income and questionable business expense deductions claimed by Tiffany and its subsidiaries for the tax years in issue.

4. In July 1980, I made an appointment with Tiffany's accountant to conduct an examination of the books and records of Tiffany. This appointment was cancelled by the accountant.

5. On August 28, 1981 I met with Tiffany's attorney, Morton S. Robson, who declined to permit me to conduct my examination. He stated he believed that the true purpose of my investigation was to obtain certain confidential information, namely, a list of Tiffany's subsidiaries's licensees and purchasers, rather than to obtain information on the correctness of Tiffany's returns. I informed him that in view of his refusal to permit me to conduct my examination, I would be forced to proceed by way of Internal Revenue Services Summons to obtain the necessary information.

6. During my conversation with Mr. Robson, I asked him whether Tiffany was in the business of selling lithographs which, as respondents point out, is one kind of business enterprise which the IRS has singled out for special audit. My reason for asking this question was that I had information from another source that a company called "Tiffany," which did business in Florida, was in the business of selling lithographs. The Tiffany of the instant matter showed no income whatsoever; hence, I questioned whether the "Tiffany," doing business in Florida, and the Tiffany herein, were one and the same. If so, I would be faced with an obvious failure to report income. Yet, when I asked Mr. Robson about this, he would neither confirm nor deny that the Tiffany herein sold lithographs. Thus, out of an abundance of caution, I asked for records relating to sales of lithographs in the summons. Consequently, contrary to respondents' assertion, it was Mr. Robson's recalcitrance—and not the IRS' zealousness—that gave rise to the lithograph issue.

7. On October 6, 1981, summonses were served upon Tiffany and World Medical directing them to appear before me to give testimony and to produce books, records, papers and other documents set forth in the summonses. A copy of the summonses were annexed to the petition herein as Exhibit B. Two summonses were served in an effort to avoid a defense of lack of control over the summoned records. However, as respondents admit, at least World Medical is a wholly owned subsidiary of Tiffany. Upon information and belief, World Video is likewise, as witness by the fact that Mr. Holstein is president of both Tiffany and World Video and that the respondents file a consolidated corporate federal income tax return.

8. The summonses were personally served on October 6, 1981.

9. On October 19, 1981 a letter from Mr. Robson was received by District Counsel Office. In his letter Mr. Robson refused to comply with the summonses, stating that in his opinion, the summonses were not issued in connection with a legitimate examination of World Medical's tax return. A copy of Mr. Robson's letter is annexed hereto to as Exhibit A.

10. In his letter, Mr. Robson incorrectly stated that I have never seen World Medical's tax returns prior to the issuance of the summons. In fact, I had received on September 30, 1981, the consolidated corporate returns of Tiffany for fiscal year 7910, which incorporates on a consolidated basis the tax information relevant to Tiffany's subsidiaries.

11. On October 20, 1981, I contacted Mr. Robson by telephone to respond to his October 16, 1981 letter. I explained to Mr. Robson that I received a consolidated tax return before I issued this summons. I further explained that the summons requested that all records be made available in order that I might properly conduct my examination into the correctness of Tiffany's federal income tax returns.

12. I told Mr. Robson that for example, Tiffany may have underreported its gross receipts because certain recourse and

non-recourse notes provided by the licensees of a product distributed by World Medical did not appear to be included in World Medical's income. In order to determine the correctness of the reporting, I would have to examine the original books of entry and the underlying licensing agreements to match the income reflected by those agreements to the income reported by World Medical. Mr. Robson again refused to comply, stating that he could provide the necessary income information if I provided him with a list of the items I needed to make this determination. Such an approach was and remains wholly unsatisfactory to me. Without examining the underlying licensing agreements, I would be unable to determine whether the respondents have properly reported their gross receipts. Parenthetically, at no time did World Medical offer to permit me randomly check certain of the licensing agreements, as claimed by Mr. Holstein in his affidavit, sworn to November 19, 1982, at ¶ 4. Even if such an offer had been made, it would still be insufficient for the reasons given above

13. I concede that by examining the licensing agreements, I would also be able to identify individuals who have participated in what appears to be an abusive tax shelter. It is certainly possible that once the individuals are identified further inquiry will be made into whether they have correctly reported their income tax liabilities.

14. One final matter must be addressed. Mr. Holstein claims that I served him personally with the petition in this action. I did not. Service was made by an agent with the IRS Brooklyn field office. I do not have any knowledge of what Mr. Holstein allegedly told the agent who served him with the petition. In any event, Mr. Holstein's claim that he stated he could not accept service for World Medical is irrelevant. Mr. Holstein admits to being president of Tiffany, the corporation which wholly owns World Medical. There can be no claim of surprise of prejudice as a result.

WHEREFORE, It is respectfully requested that the petition to enforce the summonses annexed thereto be granted in all respects.

Joel Lewis
JOEL LEWIS

Sworn to before me this
23rd day of November, 1982.

JAMIE VINCENT GREGG
Notary Public, State of New York
[illegible in original]
Commission Expires March 30, 198__ [illegible in original]

9. Transcript of hearing on Order to Show Cause

[1]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

M-18-304

UNITED STATES OF AMERICA and JOEL LEWIS,
Revenue Agent, Internal Revenue,
Petitioners

v.

TIFFANY FINE ARTS, INC. *et al.*,
Respondents

November 24, 1982
9:30 a.m.

Before:

HON VINCENT L. BRODERICK,
District Judge

APPEARANCES:

JOHN S. MARTIN, JR.,
United States Attorney for the
Southern District of New York,

JAMIE GREGG,
Assistant United States Attorney

DAVID M. RUBIN,
Attorney for respondents

[2]

THE COURT: You may proceed.

MR. GREGG: This is an action for inforcement of a summons to Tiffany Fine Arts and one of its subsidiaries, World Marketing Corporation. It is an IRS summons pursuant to 7602 of the code and asks for the books and records of Tiffany in connection with an audit of Tiffany's consolidated corporate income tax returns for 1979 and 1980.

The Service issued the summons on October 6, 1981 and they were served upon the secretary and treasurer of Tiffany Fine Arts and World Medical Marketing Corp. The taxpayer has interposed an objection to the summons and we are moving for enforcement of that summons.

The issues that have been raised by the respondents as an objection to enforcement, your Honor, is that the summons is a pretextural one and it's not designed to elicit information relevant to the taxpayers, namely Tiffany Fine Arts and its wholly-owned subsidiaires, World Marketing Corp. and World Video Corp., listed in the caption.

They contend the true purpose of the summons is to obtain the names and addresses of persons who did business with Tiffany and subsidiaries and thereby arguing that we are avoiding the John Doe summons route and avoiding the statutory requirements imposed.

It's the position of the IRS, your Honor, that

[3]

if a summons has a legitimate purpose, namely the audit of a taxpayer, pertaining to information relevant to the audit of a taxpayer, the fact that the audit will reveal information which subsequently may be used in connection with other audits, the Service contends that is a sufficient purpose under 7602 to have the summons enforced.

We concede if revenue agent Lewis, who is the revenue agent on this case, your Honor, discovers names in connection with his audit he would probably follow those names up to see if they are engaged—and, your Honor, there is an alleged abusive tax shelter involved here concerning the sale of distributorships, I believe.

I am not all that familiar with the underlying transactions. But the summons was served pursuant to an audit of Tiffany because there is a question as to whether or not they have properly reported income based on certain recourse and non-recourse notes which was used as a method of financing and selling the distributorships.

THE COURT: Mr. Rubin.

MR. RUBIN: Your Honor, I think Mr. Gregg has capsulized the issue here. We contend that the provision of Section 7609 of the code are the proper provisions to follow.

The issue here is not, although couched in the terms of the liability, the tax liability of the

[4]

respondents, based upon statements of the Internal Revenue Service contained in their manual. Statements of the Internal Revenue agent over a year ago and their conduct to date indicates that the primary objective of this summons is to determine the identity of the individuals who participated in these investment programs.

THE COURT: The agent says no. The agent says that he was assigned the tax returns with your client for audit.

MR. RUBIN: Your Honor, I believe that is an issue of fact, the motivation of the Internal Revenue.

THE COURT: But I have before me his assertion of fact.

MR. RUBIN: I understand that, your Honor. We would contest that on the following basis, your Honor:

Mr. Gregg's statement as if a legitimate purpose is served I don't believe is correct.

THE COURT: Let's me ask you this: The purpose of 7609, as I understand it, is that there not be a John Doe summons issued where there can be no notice going to anybody that the subpoena has been issued without an order of the court.

But we are in the posture now, aren't we, that whether this is something which is 7602 or 7609 it's before me and an order from me is going to deal with precisely the

[5]

same problem that would have been dealt with, if you are correct, that they are interested in third-party liability here and not the liability of the client.

MR. RUBIN: Your Honor, I understand what you are saying but I think that if they were to proceed by a 7609 summons they would have to establish three elements, one of which is the reasonable basis to believe that there is a tax liability of the John Does.

This, your Honor, I don't know can be established, one. It certainly can be established on the papers before the court and in certain cases where this issue has arisen the court has ordered a hearing either in the 7602 summons to determine the motivation of the revenue service or it has proceeded through 7609 summons.

The interesting fact, your Honor, I think very compelling, in many cases such as this where the object is an alleged abuse of tax shelter the Service has proceeded by a 7609 summons in which they have established the three elements of 7609. Here, your Honor, I believe the Service is attempting to evade the fairly simple requirements of 7609 by going through this tax liability.

THE COURT: You said that in your papers but then the government has come up with responsive papers which just contradict that.

MR. RUBIN: I haven't had an opportunity to read

[6]

them.

MR. GREGG: That's correct, I did serve them this morning.

THE COURT: Maybe we ought to take a five-minute recess while you read them.

MR. RUBIN: I suggest if there are issues of fact we have established, one, the stated objective of the IRS.

THE COURT: You haven't established anything. You have put out a supposition. "I think they aren't interested in my tax returns. I think they are interested in the tax returns of somebody else." That is all you have said.

You have tied it to one fact, and that is that they requested information as to lithographs and you pointed out that there was some IRS policy to investigate lithographs and hence this indicates they are not interested in you. That has been adequately dealt with in the answering papers.

MR. RUBIN: The other point, your Honor, is that the revenue agent requested the list of taxpayer participants in the programs over a year ago. I would think, your Honor, that at least we have established a question which we are entitled to have a hearing as to the motivation of the Service.

[7]

Of course, I would expect the Service to come back in an affidavit stating that we have the objective of the tax liability of the respondents, but I think we are entitled to pierce that conclusory statement, your Honor, just as you have categorized my statements as presumptuous.

THE COURT: Now, I get a notice from the IRS that we are going to audit your returns, bring in such and such a paper. I am then entitled to drag the IRS into court saying that I really have questions about their motivation, they don't really want to audit me because I should be audited but they want to audit me because I am a communist?

MR. RUBIN: No, I don't think that is so. Absolutely not, your Honor. I shouldn't say absolutely not. I can't respond to that. But I think I understand the court's position and my response would be the following: That the provisions of 7609 were enacted to prevent or to limit the IRS's summons powers under Section 7602, and that is the critical issue here; that the court in reaction to the case of U.S. versus Basiglia, I think is

the proper case, decided that there should be a balance between the right of the IRS to determine tax liability of taxpayers and, two, that protect the privacy of individuals.

Here, your Honor, there is abundant evidence, I believe, at least preliminarily, to establish that, in our

[8]

opinion, the primary motivation of the Service is, in fact, to determine the tax—to seek to determine the tax liability not of the respondents but of the participants and their programs.

I don't think there is a great burden, your Honor, to follow the provisions of 7609 to insure that the Service is meeting that balance. This is an ex-party proceeding and the standards of proof or the threshold standards are not terribly significant.

There have been two cases, your Honor, which we do cite in the memorandum of law, U.S. versus Barter Systems and U.S. versus Gottlieb, which Mr. Gregg tells me, your Honor, appealed but the status of those cases is that the two district courts held specifically that where the primary purpose was to identify the taxpayer participants, not the respondent's tax liability, they could not evade the provisions of 7609.

I think Mr. Gregg in stating that if a legitimate purpose is to determine the tax liability of the respondents, I think that is entirely incorrect. I think the primary purpose has to be the tax liability of the respondents, not a purpose.

THE COURT: Well, if it is a purpose to establish the tax liaiblity of your clients does the agent not have to go into information with respect to the

[9]

business that your client did and customers your client had?

MR. RUBIN: Yes, and we have offered to provide the Service with all our records with the redaction of the identities of the participants, and we have further provided that we will, at random, provide them with certain individuals who they

may want to go back and check from the entries into the corporate books back to the individuals.

But, your Honor, there is a third case on the point, U.S. versus Constantidi, and the court there upheld the summons but the case there was entirely different than the case here, your Honor.

In that case the tax liability of the respondent, which was also a barter exchange program, the tax liability of the respondent had been raised prior to the issuance of the summons. Here there is no evidence that the Service's initial motivation—other than the statement of the revenue agent, there is no statement that there is reason to believe that there tax liability exists.

In Constantidi the court said, and there was the same issue, the tax liability of the respondent was almost established although not the quantity of the liability, but the tax liability was established before the summons was issued and the District Court in that case, your Honor, said, "Well, if the primary purpose is to establish his, the respondent's, tax liability, it's too bad that"—they

[10]

didn't say it's too bad but they said, "It's permissible for the Service to establish the identity of the defendants in the course of furthering the primary objective".

MR. GREGG: I would like to comment, your Honor.

THE COURT: Let me just ask you a question. Doesn't the Service have the right on a completely random basis to pick out returns for audit?

MR. RUBIN: It certainly does, your Honor. But where we have put up what I believe is a substantial question as to the motive of the Service we are entitled to at least a hearing to determine, one, if this was a product of a random selection by the Service and, two, if in fact the motivation was related to ascertaining the tax liability of the John Does.

That, your Honor, I believe we are entitled to and I believe the courts in Barter Systems and Gottlieb held hearings. Whether the appeal, as I understand it, was not from—and Mr. Gregg can correct me, but the appeal is not from the right to have a hearing to determine the motive of the IRS but from the findings of fact which resulted from that hearing.

So I am not saying, your Honor, they are not entitled to audit returns randomly but it this case, your Honor, I believe we have put the nub of the question into the case to require at least a hearing on the subject.

[11]

Otherwise I feel that the provisions of 7609 would be emasculated.

THE COURT: Mr. Gregg.

MR. GREGG: Your Honor, I would like to make several comments concerning some of the statements that Mr. Rubin has made.

First, the respondents have argued that there was no evidence that the Service was intereseted in the tax liability of the respondents. As clearly stated in both in Revenue Agent Lewis' initial affidavit and his supplemental affidavit this issue was raised before by another representative of respondents who said—

THE COURT: Whose name is misspelled in respondent's papers.

MR. GREGG: It is R-O-B-E-S-O-N.

THE COURT: That is wrong.

MR. GREGG: It's R-O-B-S-O-N.

THE COURT: Yes.

MR. GREGG: I have it as R-O-B-S-O-N in my papers, your Honor.

THE COURT: It was misspelled in the respondent's papers.

MR. GREGG: Mr. Robson did raise this issue initially and had related to Revenue Agent Lewis that he had issued the summons without even having the tax returns

[12]

of Tiffany in front of him. Revenue Agent Lewis explained to Mr. Robson at the time that that statement was incorrect. He affirms that statement in his affidavit now.

So I would disagree with the statement that there is no evidence that the Service is interested in liability of Tiffany. There is abundant evidence and it has always been the position of the Service that they are interested in the tax return of Tiffany. The issue we have conceded, and we will concede, is that information discovered in connection with that audit may lead to subsequent audits.

THE COURT: Why isn't that an effective emasculation of 7609? 7609 was enacted by Congress as a specific reaction to something pending in the Supreme Court.

Why, if it is so that you can move from step 1, audit of A, to step 2 through 100, audit of all of A's customers, why haven't you just completely wiped out a section of the law that Congress thought it necessary to put in to protect the public from an overreaching revenue service?

MR. GREGG: I agree, your Honor. I think your Honor summed it up in the last sentence specifically. 7609 was designed to prevent overreaching by the Service. It was certainly not designed to be an inhibition upon their ability to obtain information relative to tax audits.

[13]

What your Honor would be suggesting is that the Service would have to ignore relevant information concerning any avoidance of tax that comes up in connection with an audit of a particular taxpayer.

I can make a analogy for your Honor, that being the cases which involve dual purpose allegations in civil and criminal tax

investigations. The purpose of the Service may have criminal implication. There may be a criminal tax investigation ongoing, but the Supreme Court has ruled that despite all the guarantees attendant upon the adversary process presented by a criminal situation the Service is still entitled to obtain all the records of a taxpayer until such time as it makes a referral to the Justice Department for prosecution.

I think that analogy would apply here. That situation in a criminal civil dual investigation presents the same type of potential for abuse, and I would suggest even a greater abuse in the sense that someone's liberty may be at stake, than the situation here, and yet the Supreme Court has made the judgment that even though the Service may have available to it both the civil and criminal rule in the context of a special agent investigation, a summons served by a special agent is still enforceable.

MR. RUBIN: Your Honor, I think the issue is not

[14]

the duality of the audit, although I would wonder really once the Service obtains these records whether they will pursue Tiffany, but even if there is a duality the essential issue is not the duality but what is primary.

The primary issue of of the summons is criminal. If the primary summons of a summons is to obtain the identities of the John Does that is what is binding, your Honor. We are not suggesting to inhibit the Service in general audits, your Honor.

We will provide all our records. We will provide the Service with random access to various participants to go beyond the records, your Honor. I cannot believe that the Service in auditing a return of a fairly significant entity would want to check 150 or 50 out of 50 or 150 out of 150 participants.

They might want to check a number of them at random, and this we are willing to do because we understand that they are entitled to review the books of the respondents, and if this is

their true and primary objective then we believe the compromise we have preferred is a fair one. If they want to get the other records we are not saying they are not entitled to them.

We are saying the proper way to get those records is through 7609.

One other point, your Honor, if I may. I do

[15]

believe at least we are entitled to a hearing at least with respect to the 7602 summons. But I also feel we are entitled to a dismissal of the motion not only on the failure to file the statutory and administrative steps but I believe there was at least, your Honor, a failure of service of the order on World Medical, and I think although World Video is named as a respondent there was never a summons issued to World Video. It would like the court—

THE COURT: Isn't this a group of wholly-owned companies that are filing consolidated tax returns?

MR. RUBIN: Correct.

THE COURT: As a practical matter then what difference does it make? The service was made on Tiffany. Tiffany files the tax return on a consolidated basis for the other two companies. You are being extremely technical, aren't you?

MR. RUBIN: That is my job, isn't it, your Honor?

THE COURT: Maybe that is your job but what you want is wheels to be spinned. You are here now representing all three companies.

MR. RUBIN: That's correct, Judge.

THE COURT: We are now in a position where I can issue an order to you to comply. There is no question that all three companies had notice of this subpoena. They had notice through the chief officer of the parent company who

[16]

was also a chief officer of the other companies.

MR. RUBIN: I saved my technical argument for last.

THE COURT: You didn't feel it was that strong.

MR. RUBIN: I do feel substantively that we are entitled to the relief requested.

THE COURT: Well, I don't agree. I think there is a sufficient showing in the papers, particularly the reply papers served by the government, that the government's interests or the Internal Revenue Service's interest is in an audit of the consolidated returns of these companies and I grant the government's application.

MR. RUBIN: You won't consider ordered a hearing to determine the government's motivation?

THE COURT: No, I will not. I am satisfied that on the papers there a clear factual statement as against a hypothesis and I see no reason to order a hearing.

Thank you, gentlemen.

MR. GREGG: If I may submit an order to your chambers this afternoon, your Honor?

THE COURT: Yes.

MR. RUBIN: Can we have it submitted on notice?

MR. GREGG: It would be a standard notice that we use which merely relates that the conditions of 7602 have been satisfied, orders that the summons as drafted—

[17]

we will make the modification and stipulate that the modification is as per no lithographs because we have been shown that Tiffany doesn't deal in lithographs.

So I can provide the order to Mr. Rubin right now when we go back to my office.

THE COURT: You understand it will not be on notice. He will show you a copy of the form of order.

MR. RUBIN: I don't know what the hesitancy is to put it on notice.

THE COURT: The hesitancy is that this is a two-week stint here in Part 1 and I am reluctant to carry over responsibilities from Part 1.

All right, get it typed up while you are over there and show him a copy.

MR. GREGG: I can show him one that I have used in identical 7602 situations.

THE COURT: Make a copy of that and interlineate adjustments.

MR. GREGG: I will take care of that, your Honor.

10. Order of U.S. District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

M-18-304

UNITED STATES OF AMERICA and JOEL LEWIS,
Revenue Agent, Internal Revenue Service,
Petitioners,

v.

TIFFANY FINE ARTS, INC. and its subsidiaries,
including WORLD MEDICAL MARKETING CORP. and
WORLD VIDEO CORP.,
Respondents.

Mr. Gregg
#82-2296
U.S. DISTRICT COURT
FILED
NOV 26 1982
S.D. OF N.Y.

ORDER

This matter having come on for hearing by Order to Show Cause dated November 5, 1982, directing the respondents to appear on November 23, 1982 to show cause why an order should not be entered compelling the respondents to give testimony and to produce the books, records and other papers demanded in the Internal Revenue Service summonses served upon it on October 6, 1981 (copies attached), and the Order, together with the petition and exhibits attached thereto having been served personally upon respondent Tiffany Fine Arts, Inc. and World Video Corporation in compliance with the provisions of the Order to Show Cause dated November 5, 1982, and the respondents having submitted papers in opposi-

tion to enforcement of the summonses, and having appeared on the return date of the Order to Show Cause,

NOW, upon all of the papers and proceedings herein, it is hereby

ORDERED, that the respondent shall comply fully with the Internal Revenue Service summonses served upon it on October 6, 1981 by appearing before Revenue Agent Joel Lewis, or some other authorized officer of the Internal Revenue Service, at 114 Old Country Road, Mineola, New York, on or before December 13, 1982 at 10:00 o'clock in the forenoon of that day, and by producing at that time the documents and records referred to in the Internal Revenue Service summons, which form the basis of the Order to Show Cause herein and by giving all testimony described in the summonses.

Failure to comply with this order may subject the respondent to a charge of contempt of court.

Dated: New York, New York
November 24, 1982

VINCENT L. BRODERICK
UNITED STATES DISTRICT JUDGE

11. Decision of U.S. Court of Appeals for the Second Circuit.

The decision of the U.S. Court of Appeals for the Second Circuit is reproduced at Appendix A of Petitioners' Petition for a Writ of Certiorari.

Office - Supreme Court, U.S.
FILED
JUN 18 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1007

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1983

TIFFANY FINE ARTS, INC., et al.,
Petitioners,

VS.

UNITED STATES OF AMERICA, et al.,
Respondents.

On Writ of Certiorari To
The United States Court of Appeals
For The Second Circuit

BRIEF FOR FIRST WESTERN GOVERNMENT SECURITIES, INC. AND SAMUELS, KRAMER & COMPANY AS AMICI CURIAE

IN SUPPORT OF REVERSAL

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BEST AVAILABLE COPY

QUESTION PRESENTED

Can the I.R.S. deprive unidentified taxpayers, who are under I.R.S. investigation, and who are the subjects of an administrative summons, of the congressionally-mandated safeguards of 26 U.S.C. § 7609(f), simply by choosing to investigate also the summoned party who holds the taxpayers' records?

TABLE OF CONTENTS

	Page
Question presented	i
Interest of the amici curiae	1
Summary of argument	4
Argument	6
Subsection 7609(f) applies whenever a summons seeks to investigate the tax liability of ascertainable but unidentified taxpayers, even though the summoned party is also one of the persons with respect to whose liability the summons is issued	6
A. The operation of Section 7609	6
B. Congress enacted subsection 7609(f) to protect unidentified but targeted taxpayers	8
C. Congress rejected the government's claim of administrative burden	16
D. Conflicting decisions in the Courts of Appeals	19
E. The error below	21
Conclusion	23

TABLE OF AUTHORITIES CITED

Cases

	Page
Boone v. Lightner, 319 U.S. 561 (1943)	11
Commissioner v. Bolder, 369 U.S. 499 (1962)	18
United States v. Barter Systems, Inc., 694 F.2d 163 (8th Cir. 1982)	19, 20
United States v. Bisceglia, 420 U.S. 141 (1975)	5, 8, 9, 18, 23
United States v. Euge, 444 U.S. 707 (1980)	5, 9
United States v. Flagg, 634 F.2d 1087 (8th Cir. 1980), cert. denied, 451 U.S. 909 (1981)	19
United States v. First National Bank of Dallas, 635 F.2d 391 (5th Cir. 1981)	19
United States v. Gottlieb, 712 F.2d 1363 (11th Cir. 1983)	11, 19, 20, 22
United States v. LaSalle National Bank, 437 U.S. 298 (1978)	18, 19, 22, 23
United States v. Mobil Corp., 543 F.Supp. 507 (N.D. Tex. 1981)	7
United States v. Powell, 379 U.S. 48 (1964)	5, 9, 23
United States v. Samuels, Kramer & Co., 712 F.2d 1342 (9th Cir. 1983)	1, 3, 17, 23
United States v. Thompson, 701 F.2d 1175 (6th Cir. 1983)	11, 16, 17, 19, 21, 22, 23

Statutes

Internal Revenue Code, 26 U.S.C.:	
§ 311(d)	12
§ 1001	12
§ 6045(c)(3)	10

Statutes

	Page
§ 7601	8
§ 7602	17, 18
§ 7609	passim
§ 7609(a)	3, 6, 7, 11, 13, 17, 19, 23
§ 7609(a)(1)	4
§ 7609(a)(3)	7, 10
§ 7609(a)(3)(G)	10
§ 7609(a)(4)(A)	11, 12, 13, 18, 19
§ 7609(a)(5)	7, 17
§ 7609(b)	7, 16
§ 7609(e)	16
§ 7609(f)	passim
§ 7609(f)(1)	15
§ 7609(f)(2)	15
§ 7609(f)(3)	15
§ 7609(h)	16

Other Authorities

	Page
B. Bittker & J. Eustice, Federal Income Taxation of Corporations and Shareholders (1979)	12
H.R. Rep. No. 94-658, 94th Cong., 2nd Sess. 307 (1975), reprinted in 1976 U.S. Code Cong. & Ad. News 2897	8, 14, 15, 16, 17

Other Authoritics

	Page
Senate Rep. No. 94-938, 94th Cong., 2nd Sess. 368 (1979), reprinted in 1976 U.S. Code Cong. & Ad. News 3439	8
Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, §§ 351, 352, 96 Stat. 324	7, 10
Tax Reform Act of 1976, Pub.L. No. 94-455, § 1205, 90 Stat. 1520	8
122 Cong. Rec. 23384-23389 (daily ed. July 2, 1976)	18
Senate Report No. 97-494, July 12, 1982, 97th Cong., 2nd Sess., at 283, reprinted in 1982 U.S. Code Cong. & Ad. News 781	10
Internal Revenue Manual Supplements:	
No. 45G-324	10
No. 41G-133	10
No. 42G-405	10
No. 9G-324	10
Internal Revenue Manual (Audit):	
42(17)-3 "Management of Tax Shelter Cases"	22

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

No. 83-1007

TIFFANY FINE ARTS, INC., et al.,
Petitioners,

vs.

UNITED STATES OF AMERICA, et al.,
Respondents.

On Writ of Certiorari To
The United States Court of Appeals
For The Second Circuit

BRIEF FOR
FIRST WESTERN GOVERNMENT SECURITIES, INC.
AND SAMUELS, KRAMER & COMPANY
AS AMICI CURIAE

This Brief is submitted on behalf of First Western Government Securities, Inc. and Samuels, Kramer & Company with the consent of all parties. This Brief supports petitioners and urges reversal of the decision below.

INTEREST OF THE AMICI CURIAE

First Western Government Securities, Inc. and Samuels, Kramer & Co. (hereinafter jointly referred to as "First Western") are the appellants in two appeals pending before the United States Court of Appeals for the Ninth Circuit, *United States v. Samuels, Kramer & Co., et al.*, No. 83-2416, and *United States v. Arthur Andersen & Co.*, No. 83-2417. These appeals address issues concerning the

application of Section 7609 to the enforcement of Internal Revenue Service ("I.R.S." or the "Service") administrative summonses. As in the instant case, First Western's appeals raise the issue of the propriety of the I.R.S. serving a multi-target summons to one target without obtaining pre-service judicial approval to protect the interests of other, unidentified targets "with respect to whose liability the summons is issued." (26 U.S.C. § 7609(f)).[1]

First Western is a broker and dealer of United States government securities and forward contracts in United States government securities. Since 1980, the I.R.S. has been concurrently investigating the income tax liabilities of both First Western and its customers.

In 1982 the I.R.S. issued four summonses to First Western Government Securities, Inc. and Samuels, Kramer & Co. Two of the summonses, so-called "corporate" summonses, demanded production of all corporate records held by the two companies as well as their customers' records. The other two summonses, so-called "John Doe" summonses, sought production of the same customers' records, although the summonses were facially limited to those customers who purportedly were not known to the I.R.S. at the time. Pursuant to the government's petition for enforcement, the United States District Court for the Northern District of California enforced the summonses. The United States Court of Appeals for the Ninth Circuit reversed the order of the district court and remanded the case for a limited evidentiary hearing on the issue of whether the I.R.S. acted in bad faith in issuing the summonses. *United States v. Samuels, Kramer & Co., et al.*, 712 F.2d 1342 (9th Cir. 1983).

[1]Hereafter, unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954, as amended, 26 U.S.C.

The I.R.S. also issued summonses in 1982 to Arthur Andersen & Co., which had prepared First Western's annual certified financial statements and its income tax returns. The summonses again sought production of the records of First Western as well as the records of First Western's customers. The I.R.S. provided notice of the summonses to First Western pursuant to subsection 7609(a), but failed to obtain pre-service judicial approval, in accordance with subsection 7609(f), for the summonses which related to First Western's unknown customers. The I.R.S. also failed to give notice under subsection 7609(a) to those customers who were, at the time of issuance of the Arthur Andersen summonses, known to the I.R.S.

Following the remanded hearing in *United States v. Samuels, Kramer & Co., supra*, the district court enforced the First Western summonses and also enforced the Arthur Andersen summonses. First Western appealed both enforcement orders and the Ninth Circuit entered stays pending the outcome of the appeals. As noted above, these appeals are presently pending.

In the summonses themselves, in the pleadings seeking enforcement and also during the course of the First Western summons enforcement proceedings, the I.R.S. and the Department of Justice admitted that, at the time the summonses were issued, the government intended to investigate concurrently the tax liabilities of both First Western and its customers and that the summonses were issued with respect to the tax liabilities of both. At no time has the government provided "notice" to the known customers of

First Western that their records are the subject of I.R.S. summonses. 26 U.S.C. § 7609(a)(1). Although the government obtained prior judicial approval for service of a John Doe summons with respect to the unknown customers whose records it sought from First Western, it failed to obtain pre-service judicial approval for the summonses with respect to those same unknown customers served on Arthur Andersen. 26 U.S.C. § 7609(f).

In the pending appeals, First Western contends that, pursuant to subsection 7609(a), the government must provide "notice" to those customers known to the government whose records are sought pursuant to the "corporate" and Arthur Andersen summonses. First Western further contends that with respect to the unknown First Western customers whose records are sought from Arthur Andersen, the government must obtain pre-service judicial approval pursuant to subsection 7609(f).

The issues presented to this Court in this case seek delineation of the rights under Section 7609 of known and unknown taxpayers who are the targets of I.R.S. investigations. First Western is a party to two appeals which will, in all likelihood, be directly affected by this Court's decision. Given its substantial interest in the outcome of this case, First Western respectfully requests consideration of the following arguments addressing the important issues raised by the case at bar.

SUMMARY OF ARGUMENT

The issue before this Court is whether the I.R.S. must comply with the pre-service requirements of subsection 7609(f) when it issues a summons for the purpose of

investigating concurrently the tax liabilities of the summoned party and the tax liabilities of unidentified taxpayers whose records are in the possession of the summoned party. First Western submits that Section 7609, when read as a whole and as illuminated by Congressional statements of concern for the civil rights of taxpayers under investigation, requires the I.R.S., pursuant to subsection 7609(f), to obtain judicial approval before it may serve the summonses issued in the case at bar.

This Court has consistently ruled that a deferential standard must be applied in construing the scope of the I.R.S. summons authority. *United States v. Powell*, 379 U.S. 48, 54 (1964). In *United States v. Euge*, 444 U.S. 707, 711 (1980), this Court stated, "if the summons authority claimed is necessary for the effective performance of congressionally imposed responsibilities to enforce the tax code, that authority should be upheld absent express statutory prohibition or substantial countervailing policies." *See also United States v. Bisceglia*, 420 U.S. 141, 150 (1975). Subsection 7609(f), however, when read as an integral part of the protections afforded under Section 7609, creates an express statutory prohibition against enforcement. Moreover, the statute and its legislative history identify substantial countervailing policies which require the application of subsection 7609(f) whenever, as in the case at bar, the I.R.S. seeks to investigate by administrative summons the tax liabilities of both the summoned party and ascertainable but unidentified taxpayers.

ARGUMENT

SUBSECTION 7609(f) APPLIES WHENEVER A SUMMONS SEEKS TO INVESTIGATE THE TAX LIABILITIES OF ASCERTAINABLE BUT UNIDENTIFIED TAXPAYERS, EVEN THOUGH THE SUMMONED PARTY IS ALSO ONE OF THE PERSONS WITH RESPECT TO WHOSE LIABILITY THE SUMMONS IS ISSUED

A. The Operation of Section 7609

While the I.R.S. has broad power under Section 7602 to summon a taxpayer or any other person to appear and produce any books, papers, records or other data which are relevant to investigate the correct tax liability of any person, the exercise of that power is subject to the provisions of Section 7609 in the case of a third-party summons. When the I.R.S. seeks to investigate the tax liability of a person by examination of records which are held by some other person, Congress has required the I.R.S. either to give notice to the affected taxpayer (subsection 7609(a)) or to obtain pre-service judicial approval (subsection 7609(f)).

The two operative subsections, subsections 7609(a) and 7609(f), are alternatively triggered by whether or not the summons identifies the taxpayer or taxpayers with respect to whose liability the summons is issued.[2] On the one hand,

[2]This Brief does not address the issue of whether the I.R.S. must give notice under subsection 7609(a) to those taxpayers whose identities it has learned from a recordkeeper's production under a John Doe summons.

if pursuant to subsection 7609(a)(5)[3] the summons identifies the taxpayer whose liability is being investigated, and the summons is served upon a "third-party recordkeeper",[4] subsection 7609(a) requires the I.R.S. to give notice to the person or persons identified. Such "noticees" are entitled to begin, or intervene in, a proceeding to challenge enforcement of the summons. 26 U.S.C. § 7609(b).[5]

On the other hand, if the summons does not identify the person or persons "with respect to whose liability the summons is issued," subsection 7609(f) requires that before a summons may be served, a court proceeding must be initiated by the government at which the Service must establish that: (1) the summons relates to the investigation of a particular person or ascertainable group of persons; (2) there is a reasonable basis for believing that such person or persons may have failed to comply with any internal revenue law; and (3) the information sought by the I.R.S. is not readily available from other sources.[6]

[3]Subsection 7609(a)(5) provides that, for any applicable summons, the summons must "identify the taxpayer to whom the summons relates or the other person to whom the records pertain."

[4]The term, "third-party recordkeeper," is defined in subsection 7609(a)(3).

[5]The summonses at bar were issued on October 6, 1981. At that time, subsection 7609(b) provided that the government had to petition the district court to obtain an order enforcing the summonses. A non-summoned taxpayer, seeking to prevent enforcement, was obligated to intervene. 26 U.S.C. § 7609(b). Since January 1, 1983, pursuant to the Tax Equity and Fiscal Responsibility Act of 1982, Pub.L. No. 97-248, §§ 351, 352, 96 Stat. 324, the burden is upon the recordkeeper or the non-summoned taxpayer to initiate an action to quash the summons. 26 U.S.C. § 7609(b).

[6]Subsection 7609(f) applies regardless of whether it is served on a statutorily-defined "third-party recordkeeper." *United States v. Mobil Corp.*, 543 F.Supp. 507, 516 (N.D. Tex. 1981).

B. Congress Enacted Subsection 7609(f) to Protect Unidentified but Targeted Taxpayers

Congress enacted Section 7609 in response to this Court's broad construction of the administrative summons authority of the I.R.S. in *United States v. Bisceglia,* 420 U.S. 141 (1975). In *Bisceglia,* the Court ruled that the I.R.S. was authorized under the broad language of Section 7601 and Section 7602 to issue a so-called "John Doe" summons to seek books and records of a transaction without naming the taxpayer involved. The Court concluded that the only protection afforded from arbitrary and capricious actions was the federal courts. *Id.* at 151. Troubled by the implications of *Bisceglia,* Congress enacted Section 7609 as a part of the Tax Reform Act of 1976, Pub.L. No. 94-455, § 1205, 90 Stat. 1520.[7]

By enacting Section 7609, Congress subjected the summons authority of the I.R.S. to certain procedural safeguards to protect the "right of privacy" of taxpayers under investigation. (House Report at 308.) While recognizing that administrative summonses constitute an "important investigative tool" for the I.R.S., Congress declared that such summonses "should not unreasonably infringe on the civil rights of taxpayers, including the right of privacy." (House Report at 308.) Section 7609 manifests a congressionally-struck balance between the Service's need for effective investigative tools and the taxpayers' fundamental rights of privacy.

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[7]H.R. Rep. No. 94-658, 94th Cong., 2nd Sess. 307 (1975), *reprinted in* 1976 U.S. Code Cong. & Ad. News 2897, 3203 (hereafter "House Report"); Senate Rep. No. 94-938, 94th Cong., 2nd Sess. 368 (1979), *reprinted in* 1976 U.S. Code Cong. & Ad. News 3439, 3796 (hereafter "Senate Report").

In structuring that balance, Section 7609 constitutes "unambiguous directions from Congress" to subject the summons authority of the I.R.S. to certain procedural safeguards. *United States v. Bisceglia, supra* at 150. Failure to satisfy the applicable requirements of Section 7609 compels denial of service or enforcement of the summons. *United States v. Powell,* 379 U.S. 48, 57-58 (1964) (one of the prerequisites to enforcement is that the administrative steps required by the Internal Revenue Code have been followed). Accordingly, the I.R.S. is not entitled to deferential consideration of its claimed summons authority; the issue here is the construction of an "express statutory prohibition"[8]: Are the procedural safeguards and prohibitions imposed by Congress in subsection 7609(f) rendered inapplicable whenever the Service identifies the summoned party as one of the multiple targets "with respect to whose liability the summons is issued"? The answer, compelled by the language of Section 7609 and its legislative history, is that subsection 7609(f) applies whenever there are ascertainable, but unidentified, targets, even if the summoned party is one of the targets.

Section 7609, when read as a whole, demonstrates that Congress sought to protect any targeted taxpayer, even when the recordkeeper is also a target of the I.R.S. investigation. There are numerous examples in Section 7609 and its legislative history where Congress anticipated the summoned party as a target yet mandated the application of the statute's safeguards. First, Congress expressly included within the category of "third-party recordkeepers" a well-known audit target of the I.R.S. Within the definition

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[8]*United States v. Euge,* 444 U.S. 707, 711 (1980).

of "third party recordkeeper", Congress included any "barter exchange (as defined in Section 6045(c)(3).)" 26 U.S.C. § 7609(a)(3)(G).[9] The inclusion of a "barter exchange" as a "third-party recordkeeper" was made when Congress was well aware that the I.R.S. was investigating concurrently the tax liabilities of both barter exchanges and barter exchange members.[10] The inclusion of barter exchanges, in light of the declared audit program of the I.R.S., demonstrates a congressional recognition that a "third-party recordkeeper" may be one of the targets of the investigation and yet Section 7609 still applies.

The construction of Section 7609 sought by the government, however, suggests that the statute's protections would be inapplicable whenever the Service chose to audit a barter exchange and its members. Indeed, the Service has fre-

[9]Congress amended subsection 7609(a)(3) to include "any barter exchange" by the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. 97-248, enacted August 19, 1982, effective September 3, 1982 (. . . "the committee believes that barter exchanges ought to be granted status as third-party recordkeepers."). Senate Report No. 97-494, July 12, 1982, 97th Cong., 2nd Sess., at 283, *reprinted in* 1982 U.S. Code Cong. & Ad. News 781, 1028.

[10]On September 17, 1979, the I.R.S. established the Barter Exchange Project Unreported Income Program. *See* Department of Treasury, Manual Supplements No. 45G-324, 41G-133, 42G-405 and 9G-114. The manual states that the purpose of the project is to "identify and select returns in need of examinations that are associated with organized barter exchanges . . . [including] the return of barter exchanges, owners and operators and members of such exchanges." The manual further provides that if the operator of the exchange declined to furnish information concerning its members, a John Doe summons pursuant to Section 7609(f) should be issued after consultation with District Counsel. Man. Supp. No. 45G-324, §§ 7.01-.02(1) at 4.

quently audited both the barter exchange and its members. *See, e.g., United States v. Thompson,* 701 F.2d 1175, 1178 (6th Cir. 1983); *United States v. Gottlieb,* 712 F.2d 1363 (11th Cir. 1983). Given this pattern of concurrent investigations, as well as the Service's institutional directives (*see supra* at n.10), the government's proposed construction would render the congressional inclusion of "any barter exchange" a nullity. A construction of a statute that renders it meaningless must be rejected. *Boone v. Lightner,* 319 U.S. 561, 565 (1943).

Second, Section 7609 directly addresses the situation where the summoned party is a target of the summons. In subsection 7609(a)(4)(A), Congress excepted application of the notice requirements of subsection 7609(a) whenever the summons was "served on *the* person with respect to whose liability the summons was issued, or any officer or employer of such person" (emphasis supplied). Congress reasonably perceived that, when the summoned party was the only target, no substantial interest was served by requiring that notice be given to all persons who are described in the summoned records but who are not under investigation.[11] In addition, Congress appears to have been concerned with the situation where a corporate employee or officer is served with a summons, *i.e.,* the "in-house" cus-

[11]Contrast the Congressional concern when the summoned party was not a target:

> While the third-party witness [the summoned party] also has this right of challenge, even under present law, the interest of the third-party witness in protecting the privacy of the records in question is frequently less intense than of the person to whom the records pertain. (House Report at 308.)

todian of records. The exception clarifies that the target corporation itself is not entitled to a "second" notice.[12]

Third, the intent of Congress that Section 7609 apply, even when the summoned party is one of the audit targets, is again illustrated by one of the factual examples used by Congress to explain the application of subsection 7609(f). The Committee Reports explain that a "John Doe" summons was appropriate where the Service sought "to obtain the names of corporate shareholders involved in a taxable reorganization which had been characterized by the corporation (in a letter to its shareholders) as a nontaxable transaction." (House Report at 312.) Under this example, in all likelihood, the corporation would also be under investigation of its tax liability in addition to the corporate shareholders.[13] The example illustrates that subsection 7609(f) will apply notwithstanding the identification of the summoned party as one of the persons with respect to whose liability the summons is issued.

---

[12]The exception under subsection 7609(a)(4)(A) does not apply to a summons which falls within the requirements of subsection 7609(f).

[13]If the transaction fails to qualify for non-recognition treatment under the reorganization provisions of the Internal Revenue Code, it will be treated under the Code provision dealing with sales, liquidations, redemptions or dividends, depending upon which type of transaction it most resembles. 26 U.S.C. §§ 1001 (sales), 336-337 (liquidating distributions), or 302 (redemption distributions); *see also* B. Bittker & J. Eustice, *Federal Income Taxation of Corporations and Shareholders*, ¶ 14.57 at 14-192 (1979). Under any one of these categories, such treatment could cause the corporation to be taxed on a purported sale of corporate assets or, pursuant to Section 311(d) of the Internal Revenue Code, for the use of appreciated assets to redeem the corporation's own stock.

It is significant to note that Congress, by unambiguous and direct language, provided that Section 7609 would not limit the summons authority of the I.R.S. where the summoned party was the *only* target "with respect to whose liability the summons is issued." As explained above, pursuant to subsection 7609(a)(4)(A), the notice requirements of subsection 7609(a) do not apply when the summoned party is the only target. Similarly, subsection 7609(f) does not apply when the summoned party is the only target, inasmuch as the summoned party is identified and is the only party with respect to whose tax liability the summons is issued. As clearly as Congress rendered Section 7609 inapplicable when the summoned party was the only target, the legislative history demonstrates that Congress clearly intended Section 7609 to apply when the summoned party was but one of multiple targets of the I.R.S. investigation.

The legislative history of Section 7609 reveals that Congress was primarily concerned with providing protection to those persons who would not otherwise know of the service of the summons, or those unidentified taxpayers who could not receive notice but whose rights of privacy could be abused. Congress provided a simple procedural remedy:

> The committee believes that many of the problems in this area would be cured if the parties to whom the records pertain were advised of the service of a third-party summons, and were afforded a reasonable and speedy means to challenge the summons where appropriate . . . .
>
> In the case of a John Doe summons, advance notice to the taxpayer is obviously not possible. Here the committee decided that the IRS agent should be required to show adequate grounds for serving the summons in

an independent review process before a court before any such summons can be served. (House Report at 380.)

Crucial to the issue at bar is the recognition by Congress that *all* taxpayers, with respect to whose liability the summons is issued, are entitled to the procedural safeguards of Section 7609. Congress recognized that one taxpayer could not adequately represent, nor assert the personal defenses of, all other taxpayers, particularly such personal defense as "attorney-client privilege" or "Fifth Amendment rights." (House Report at 310.) Accordingly, Congress required that all taxpayers are to receive the protections of Section 7609:

> Where more than one person is identified in the description of the records as a person the records of whose transactions are to be inspected, then *all such persons* are to have the right to receive notice under these provisions, and are also to have the right to challenge the summons . . . (House Report at 309 (emphasis supplied).)

Congress' concern for "all" taxpayers expressly included "John Doe" taxpayers. Congress recognized that such unidentified taxpayers were particularly entitled to protection. (House Report at 308.) Congress was concerned that the administrative provisions of the I.R.S. authorizing John Doe summonses did "not fully provide all the safeguards which might be desirable in terms of protecting the right of privacy." (House Report at 308.) Indeed, Congress emphasized that it did not "intend that the John Doe summons be available for purposes of enabling the Service to engage in a possible 'fishing expedition'." (House Report at 312.) Congress was especially sensitive to the potential

for abuse of John Doe summonses, and required the Service to "convince the court that it has made a good faith, reasonable effort to explore other methods of investigation, and that use of the John Doe summons is the only practical means of obtaining information needed by the Service." (House Report at 312-313.) These compelling congressional concerns for the rights of unidentified yet targeted taxpayers would be betrayed if the provisions of subsection 7609(f) dissolve whenever the Service chooses to name the summoned party as one of the targets of the investigation.

The mere fact that the summoned party is one of the targets does not satisfy the factual predicate which Congress required to entitle the I.R.S. to serve a summons to investigate the tax liability of unidentified taxpayers. 26 U.S.C. § 7609(f). In such a situation, there is no assurance that the unidentified taxpayers constitute an "ascertainable group or class of persons", or that "there is a reasonable basis for believing that such group or class of persons" may have violated the Code, or that the information sought "is not readily available from other sources." 26 U.S.C. § 7609 (f) (1), (2) and (3). To deny application here, simply because the summoned party is one of the targets, will deny and thwart the Congressional purpose of protecting the unidentified taxpayers under investigation.

Section 7609, by its express provisions and its legislative history, demonstrates that Congress intended, even when the summoned party is a target, that the safeguards of subsection 7609(f) apply to protect the civil rights of the unidentified taxpayers.

C. Congress Rejected the Government's Claim of Administrative Burden

Congress was sensitive to the administrative burden that Section 7609 might impose on the I.R.S. (House Report at 310, 312). Congress devised expeditious proceedings and modest factual showings but still required, without significant exceptions, either notice or pre-service judicial approval when the I.R.S. issued an administrative summons to investigate non-summoned taxpayers. This delicate balance between modest substantive requirements for the I.R.S. and procedural safeguards for the taxpayers is evident throughout Section 7609.

Subsection 7609(b) provides for expedited consideration of a challenge to the enforcement of the summons. In addition, the statute of limitations for assessment of a taxpayer's liability is suspended during any period of court action for any taxpayer who challenges the summons. 26 U.S.C. § 7609(e). With respect to a John Doe summons, subsection 7609(h) provides *ex parte* consideration of the I.R.S.'s application for service. Moreover, the factual requirements to justify service of a John Doe summons are modest.[14] *United States v. Thompson*, 701 F.2d 1175, 1180 (6th Cir. 1983). These provisions reveal that Congress structured subsection 7609(f) to require the Service to seek prior judicial approval for a John Doe summons,

[14]Congress explained that ". . . the committee does not intend to impose an undue burden on the Service in connection with obtaining a court authorization to serve this type of summons. For example, the Service is not required to show that there is 'probable cause' . . . It is enough for the Service to reveal to the court evidence that a transaction has occurred, or may have occurred, and that the transaction . . . is of such a nature as to be reasonably suggestive of the possibility that the correct tax liability . . . may not have been reported . . ." (House Report at 312.)

but expedited and minimized the factual showing necessary to justify service of the summons. In essence, for both subsections 7609(a) and 7609(f), Congress afforded opportunities for protection of the taxpayers but without expanding the substantive rights of the taxpayers. (House Report at 310.) Accordingly, the administrative "burdens" of notice and pre-service judicial approval are the direct "burdens" which Congress imposed to protect the rights of the non-summoned taxpayers.

The government speculates that, if subsection 7609(f) applies when the summoned party is one of the targets, then "anyone who receives a summons under Section 7602 could demand that the I.R.S. satisfy the more rigorous requirements of Section 7609(f), subjecting the Service to far greater administrative and enforcement burdens than Congress can possibly have intended." Brief of United States in Opposition to Petition for Certiorari ("Govt. Brief in Opp. to Cert.") at 7.[15] The government, however, conveniently ignores the determinative question of the application of Section 7609: Who is the person or persons with respect to whose liability the summons is issued? *See* 26 U.S.C. § 7609(a)(5); *United States v. Thompson, supra* at 1179. If the summons is issued to investigate solely the tax liability of the summoned party, Section

[15]The government's speculation is not only unfounded, as demonstrated in the text, but also distorted. The requirements of subsection 7609(f) are far from "rigorous". *United States v. Thompson, supra* at 1180; *see also, supra* at n.14. Moreover, the application of subsection 7609(f) cannot subject "the Service to far greater . . . enforcement burdens . . . ." The requirements of subsection 7609(f) cannot be challenged at the "enforcement hearing". *United States v. Samuels, Kramer & Co.*, 712 F.2d 1342, 1346 (9th Cir. 1983).

7609 does not apply. 26 U.S.C. §§ 7609(a)(4)(A), 7609(f).[16] However, if there are other targets of the summons, in addition to the summoned party, such other taxpayers are entitled to the protections of Section 7609. Prior to the enactment of Section 7609, the government, through the Department of Justice, the Treasury Department and the Administrative Office of the United States Courts, argued strenuously to the Senate Finance Committee that notice and pre-service judicial review would seriously delay the administration of the tax laws through the actions of recalcitrant taxpayers. 122 *Cong. Rec.* 23384-23389 (daily ed. July 22, 1976). After hearing these arguments, Congress enacted Section 7609 and thereby rejected the government's claims. *Cf. Commissioner v. Bolder,* 369 U.S. 499 (1962). Here again, the "burden" which the Service seeks to avoid is the "burden" expressly imposed by "unambiguous directions from Congress." *United States v. Bisceglia, supra* at 150.[17]

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[16]The government fears that if it cannot satisfy the modest showing required under subsection 7609(f), the summons cannot be served and the I.R.S. will be prevented from investigating the tax liabilities of the summoned party. However, in that situation, if the Service desires to investigate the summoned party, it can simply request the district court to narrow the scope of the summons to provide that the records summoned can be used only for the investigation and audit of the summoned party. *United States v. Bisceglia, supra* at 151.

[17]The government also argues that "dual purpose" summonses are valid under Section 7602, citing *United States v. LaSalle National Bank,* 437 U.S. 298 (1978). Hence, according to the government, a "dual purpose" summons to audit both the summoned party and other unidentified taxpayers does not trigger the operation of subsection 7609(f). Govt. Brief in Opp. to Cert. at 6. This argument is illogical and semantically misleading.

Generally, the Service has been permitted to enforce a summons which, although issued with respect to the liability of only one taxpayer, serves a secondary purpose, such as assembling research data for a "Taxpayer Compliance Measurement Program." *United States v. First National Bank of Dallas,* 635 F.2d 391 (5th Cir. 1981); *see also United States v. Flagg,* 634 F.2d 1087 (8th Cir. 1980), *cert. denied,* 451 U.S. 909 (1981). But these cases are not instructive to the issue at bar. The Eighth Circuit in *United States v. Barter Systems, Inc., supra,* at 167 n.10, came to the same conclusion, ". . . *LaSalle National Bank* . . . and . . . *First National Bank of Dallas* . . . are not directly on point." The cases cited by the government implicate only the rights of the summoned party. Subsection 7609(f) does not apply when the only person with respect to whose liability the summons is issued is the summoned party. Similarly, the notice requirements under 26 U.S.C. § 7609(a) do not apply when the summoned party is the only person with respect to whose liability the summons is issued. 26 U.S.C. § 7609(a)(4)(A). The instant case implicates the rights of not only the summoned party but also numerous ascertainable but unidentified taxpayers. The issue at bar is not "dual purpose" summonses, but rather multi-party summonses, particularly multi-target summonses.

The government's plea of administrative burden seeks in reality the total emasculation of Section 7609. Under the government's "burden-free" construction, by simply manufacturing a *prima facie* legitimacy to an investigation of the summoned party, the I.R.S. would be entitled to avoid Section 7609 entirely. Such a construction impermissibly offers the I.R.S. "an irresistible invitation" to circumvent the safeguards mandated by Congress in Section 7609. *United States v. Thompson, supra* at 1179 n.8.

D. Conflicting Decisions in the Courts of Appeals

The issue at bar has been addressed in three similar cases: *United States v. Gottlieb,* 712 F.2d 1363 (11th Cir. 1983); *United States v. Thompson,* 701 F.2d 1175 (6th Cir. 1983); *United States v. Barter Systems, Inc.,* 694 F.2d 163 (8th Cir. 1982). In *Barter Systems,* the Eighth Circuit held that, notwithstanding a finding that one of the purposes of

the summons was to aid in the investigation of unidentified members of the barter exchange, subsection 7609(f) did not apply to the summons issued there, since the summons did identify the person with respect to whose tax liability the summons was issued, namely the barter exchange, and therefore was not a John Doe summons. *United States v. Barter Systems, Inc., supra* at 168.

In *United States v. Gottlieb,* 712 F.2d 1363 (11th Cir. 1983), the Eleventh Circuit recognized the existence of an institutional purpose to investigate the tax liabilities of both the recordkeeper and unidentified taxpayers whose records were in the recordkeeper's possession. *United States v. Gottlieb, supra* at 1367. The Eleventh Circuit held that subsection 7609(f) did not apply in the absence of an express statutory prohibition against enforcement and where neither the statute nor the legislative history identified any substantial countervailing policies which required denial of enforcement of the summons. *United States v. Gottlieb, supra* at 1368. Neither the Eighth Circuit in *Barter Systems* nor the Eleventh Circuit in *Gottlieb* were able to cite any explicit expression of congressional intent on the issue. *United States v. Barter Systems, supra* at 168-169; *United States v. Gottlieb, supra* at 1367. The underlying analyses in *Barter Systems* and *Gottlieb* are defective in the failure to recognize subsection 7609(f) as a congressionally-expressed procedural limitation on the summons authority of the I.R.S. Further, both decisions fail to acknowledge the purpose of subsection 7609(f), in light of the unambiguous direction from Congress, to afford protections to the unidentified taxpayers under investigation.

In *United States v. Thompson,* 701 F.2d 1175 (6th Cir. 1983), the Sixth Circuit found that, at the time of the issuance of the summons, the institutional posture of the I.R.S. as well as the personal intent of the agents was to target the members of the barter exchange as well as the barter exchange operator. *United States v. Thompson, supra* at 1178. The Sixth Circuit held that, under this circumstance, the literal language of subsection 7609(f) triggers the operation of the John Doe summons procedures. The court held that it was immaterial that the primary purpose may have been to audit the barter exchange. *Id.* The Sixth Circuit carefully observed that its decision "only applies where it is shown that there exists a clear intent to investigate unknown third parties at the time the summons is issued." *United States v. Thompson, supra* at 1180.

E. The Error Below

In the instant case, the Court of Appeals erred in applying the wrong legal standard to determine whether subsection 7609(f) was applicable. The correct legal standard, consistent with the holding in *United States v. Thompson, supra,* is whether the I.R.S. seeks, at the time of issuance of the summons, to use the records summoned to identify or investigate the tax liability of any unidentified person, persons or ascertainable class of unidentified persons other than the summoned party. If the I.R.S. is investigating only the tax liability of the summoned party, Section 7609 does not apply. Such a single-target summons is not rendered unenforceable because of the possibility that the I.R.S. may obtain some incidental benefit from the summoned records in a prospective investigation of some other taxpayer.

Section 7609 should apply, however, if the Service intends, at the time of issuance, to use the summoned records to investigate any person other than the summoned party.[18] The summons must identify all of the taxpayers to whom it relates or that ascertainable class of persons with respect to whose liability it is issued. The burden is on the summoned party to establish that the I.R.S. has failed to identify or describe all of the persons with respect to whose tax liability the summons is issued.[19] *United States v. LaSalle National Bank*, 437 U.S. 298, 316 (1978). In some cases, that burden is easily satisfied when the I.R.S. is conducting an institutionally-declared audit program, such as the Barter Exchange Program Unreported Income Project[20] or the Abusive Tax Shelter Program.[21] In such programs, the I.R.S. admits that its intent is to audit both the promoter/owner and the investor/member. *See, e.g., United States v. Gottlieb, supra; United States v. Thompson, supra; United States v. Samuels, Kramer & Co., supra.* Federal courts are well-experienced in determining the purpose or intended use of I.R.S. summonses. *See, e.g., United States v. LaSalle National Bank, supra; United States v. Bisceglia, supra; United States v. Powell, supra.*

[18]The standard is whether or not the agent or the Service institutionally had, as a motivating factor, the investigation of the unidentified taxpayers at the time of the issuance of the summons. *United States v. Thompson, supra* at 1181. The issue is not, as explained in *Thompson*, whether the Service had a primary or secondary intent to investigate the unidentified taxpayers. As the Sixth Circuit recognized, it is preferable to avoid an inquiry into the subjective intent of the agent or agency as to whether any one particular purpose was a primary or secondary consideration. *United States v. Thompson, supra* at 1181.

[19]The summoned party may also establish that the summons was issued for the purpose of obtaining the third-party records and that the audit of the summoned party itself was a mere pretext or subterfuge. *United States v. Gottlieb, supra* at 1369.

[20]*See supra* at n. 10.

[21]Internal Revenue Manual-Audit, 42(17)-3, "Management of the Tax Shelter Cases" ("The facts and documentation that are developed during examination of the promoter/syndicator are used in proposing adjustments to the investors' returns.").

CONCLUSION

Section 7609 does not limit the power of the I.R.S. to investigate the summoned party when that party is the sole target of the Service's investigation. Neither subsection 7609(a) nor subsection 7609(f) applies when there are no other targets but the summoned party. When the I.R.S. seeks to utilize an administrative summons to investigate a non-summoned taxpayer, Section 7609 applies. The I.R.S. imposes upon itself the application of Section 7609 by its use of a summons which gives notice to only one of several targets. Section 7609 will deny enforcement of a summons when the I.R.S. seeks to use the products of that summons against a taxpayer who, without the application of Section 7609, would be denied protection of its congressionally-recognized rights of privacy.

For the above-stated reasons, the judgment of the court below should be reversed.

Respectfully submitted,

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No. 83-1007

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In the Supreme Court of the United States

OCTOBER TERM, 1984

TIFFANY FINE ARTS, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the "John Doe" rules of Section 7609(f) of the Internal Revenue Code of 1954 (26 U.S.C.) apply to summonses that are issued by the IRS to a named taxpayer in connection with an investigation of that taxpayer's liability, where the information sought also might facilitate the investigation of other, unnamed taxpayers.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statute involved	2
Statement	2
Summary of argument	7
Argument:	
The John Doe provisions of Section 7609(f) are inapplicable to IRS summonses that are issued to named taxpayers who are themselves under investigation	11
A. Section 7609(f) cannot properly be read to apply to summonses that are issued to named taxpayers who are under investigation, even though the requested information also will be relevant to the tax liability of other taxpayers	13
B. The legislative history of Section 7609(f) indicates that the John Doe rules do not apply when the summoned taxpayer is under investigation	16
C. Application of the John Doe rules to cases in which the summoned taxpayer is under investigation would be unmanageable and would seriously impede enforcement of the revenue laws	24
D. So long as one of the purposes served by a summons is authorized under Section 7602(a), the summons may be issued under that section	30
Conclusion	32
Appendix	1a

TABLE OF AUTHORITIES

Cases: Page

Abraham v. *United States*, No. 84-6101 (2d Cir. July 18, 1984), aff'g 582 F. Supp. 257 ..... 20, 21
Chapman v. *Commissioner*, 618 F.2d 456 19
Donaldson v. *United States*, 400 U.S. 517 .....14, 16, 21, 24
Heverly v. *Commissioner*, 621 F.2d 1227 19
Schulze v. *Rayunec*, 350 F.2d 665, cert. denied, 382 U.S. 919 19
Tax Liabilities of John Does, In re, 688 F.2d 144.... 21
Tillotson v. *Boughner*, 350 F.2d 663 19
United States v. *Armour*, 376 F. Supp. 318 ..... 18, 19
United States v. *Arthur Young & Co.*, No. 82-687 (Mar. 21, 1984) 7, 10, 14, 15, 24, 30, 31
United States v. *Barter Systems, Inc.*, 694 F.2d 163 .....6, 15, 19, 22, 26
United States v. *Berkowitz*, 488 F.2d 1235 19
United States v. *Bisceglia*, 420 U.S. 141 .....7, 14, 17, 18, 19, 29
United States v. *Carter*, 489 F.2d 413 19
United States v. *Conrad*, 36 A.F.T.R.2d (P-H) ¶ 75-5247 19
United States v. *Euge*, 444 U.S. 707 .....*passim*
United States v. *First National Bank*, 635 F.2d 391, cert. denied, 452 U.S. 916 ..... 30, 31
United States v. *Flagg*, 634 F.2d 1087 31
United States v. *Gottlieb*, 712 F.2d 1363 .....6, 15, 17, 19, 21, 22, 26
United States v. *Humble Oil & Refining Co.*, 488 F.2d 953, vacated and remanded, 421 U.S. 943, on remand, 518 F.2d 747 19
United States v. *LaSalle National Bank*, 437 U.S. 298 .....10, 26, 27, 28, 30, 31
United States v. *Morgan Guaranty Trust Co.*, 572 F.2d 36, cert. denied, 439 U.S. 822 29
United States v. *Pittsburgh Trade Exchange*, 644 F.2d 302 .....16, 22, 31
United States v. *Powell*, 379 U.S. 48 .....2, 14, 15, 16, 20, 22, 29
United States v. *Samuels, Kramer & Co.*, 712 F.2d 1342 .....17, 21, 22

Cases—Continued: Page

United States v. *Theodore*, 479 F.2d 749 19
United States v. *Thompson*, 701 F.2d 1175 ....7, 10, 14, 26
United States v. *Turner*, 480 F.2d 272 19

Constitution and statutes:

U.S. Const. Amend. V 22
Internal Revenue Code of 1954 (26 U.S.C.):
§ 701 28
§ 702 28
§ 1363 28
§ 1366 28
§ 6501(c) 27
§ 6501(e)(1) 27
§ 7402(b) 2, 4
§ 7601 26
§ 7602 .....*passim*
§ 7602(a) 2, 3, 15, 29, 30
§ 7602(a)(2) 2
§ 7604 .....2, 4, 21
§ 7604(a) 2
§ 7605(b) 15
§ 7609 .....16, 20, 26
§ 7609(a) 2, 17, 20, 22
§ 7609(a)(3) 16
§ 7609(a)(4) 22
§ 7609(a)(4)(A) 20
§ 7609(b) 16, 17
§ 7609(f) .....*passim*
§ 7609(h) 2
§ 7609(h)(2) 2, 21
§ 7609(h)(3) 2, 25
Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324 *et seq.* 16
§ 333, 96 Stat. 622 28

Miscellaneous:

[2 Audit] Internal Revenue Manual (CCH) (Dec. 9, 1980) 28
H.R. Rep. 94-658, 94th Cong., 1st Sess. (1975).....8, 9, 17, 18, 19, 20, 22

Miscellaneous—Continued: Page

S. Rep. 94-938, 94th Cong., 2d Sess. (1976) 16, 18, 19-20, 21, 26

Tax Reform (Administration and Public Witnesses): Hearings Before the House Comm. on Ways and Means, 94th Cong., 1st Sess. (1975) 18

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 718 F.2d 7. The district court did not issue a written opinion.

JURISDICTION

The judgment of the court of appeals (Pet. App. A1) was entered on September 13, 1983. A petition for rehearing was denied on October 28, 1983 (Pet. App. A13). The petition for a writ of certiorari was filed on December 19, 1983 and was granted on April 2, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTE INVOLVED

Section 7602(a)(2), 7604(a) and 7609(a), (f) and (h) of the Internal Revenue Code of 1954 (26 U.S.C.) are set forth in the statutory appendix, *infra*, 1a.

STATEMENT

1. Section 7602(a)(2) of the Code[1] authorizes the IRS to issue summonses ordering the production of "books, papers, records, or other data * * * as may be relevant or material" to a tax investigation. If the summoned party fails to comply voluntarily, the Service may petition the appropriate district court to enforce its summonses. I.R.C. §§ 7402(b), 7604. To obtain the court's assistance, the IRS must establish only that "the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed * * *." *United States* v. *Powell*, 379 U.S. 48, 57-58 (1964).

A different provision of the Code applies, however, when a summons designed to obtain information about unidentified taxpayers is issued to an individual who is not himself the subject of an investigation. Under Section 7609(f), the IRS may issue such a "John Doe summons"—defined in the Code as one "which does not identify the person with respect to whose liability the summons is issued"—only "after a court proceeding" in which the Service establishes three things: (1) that "the summons relates to the

[1] Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the Code or I.R.C.).

investigation of a particular person or ascertainable group or class of persons"; (2) that a reasonable basis exists "for believing that such person or group or class of persons may fail or may have failed to comply with any provision of any internal revenue law"; and (3) that both the information sought and the identity of the person whose liability is at issue "is not readily available from other sources." § 7609(f)(1)-(3). The Service's presentation to the court is made ex parte, and the court's determination must be "made solely on the petition and supporting affidavits." § 7609(h)(2).[2]

2. In late 1981 the IRS undertook an investigation into the 1979-80 tax liability of petitioners, related corporations that promote tax shelter investments.[3] On September 30 of that year Revenue Agent Joel Lewis, who was conducting the investigation, obtained copies of petitioner Tiffany Fine Arts' 1979 consolidated tax return (J.A. 23a).[4] Not long afterwards, on October 6, 1981, Lewis issued four summonses to petitioners pursuant to Section 7602(a) of the Code. These requested all of petitioners' financial records and books of account for the periods ending October 31, 1979 and October 31, 1980, as well as a list of the names, addresses, and taxpayer identifi-

[2] Section 7609(h)(3) provides that, except in limited circumstances, summons enforcement actions and proceedings brought under Section 7609(f) "take[] precedence on the docket over all other cases."

[3] Petitioner Tiffany Fine Arts, Inc. is a holding company; the other petitioners are its subsidiaries (Pet. App. A2).

[4] Previously, in July 1980 Lewis had made an appointment with petitioners' accountant "to conduct an examination of [their] books and records" (J.A. 22a), but the appointment was cancelled by the accountant.

cation numbers of persons who had acquired "Pedi-Pulsor" distributorships from petitioners (J.A. 4a-7a).[5]

Petitioners refused to comply with the summonses, contending that the IRS could obtain information touching on their customers and franchisees only by invoking the John Doe provisions of I.R.C. § 7609(f). When petitioners suggested that they might provide redacted records, Lewis explained that "[w]ithout examining the underlying licensing agreements," he "would be unable to determine whether the [petitioners] ha[d] properly reported their gross receipts" (J.A. 24a). Upon petitioners' continued refusal to comply with the summonses, the government brought this enforcement action in the Southern District of New York pursuant to I.R.C. §§ 7402(b), 7604.

In support of its enforcement petition, the government introduced two affidavits executed by Lewis. He affirmed that he was "conducting an investiga-

[5] The "Pedi-Pulsor" is a medical device marketed by petitioners (Pet. App. A2). Some time before August 28, 1981, Lewis had asked petitioners for a list of the "Pedi-Pulsor" licensees, but the request was refused (*ibid.*).

One of the summonses issued on October 6 also requested production of a list of clients "who acquired lithographs from Tiffany Fine Arts, Inc." (J.A. 5a). While Tiffany Fine Arts does not in fact sell lithographs (Pet. App. A4), Lewis explained that he had received information that a company named "Tiffany" was marketing lithographs in Florida (J.A. 22a). Because Tiffany Fine Arts "showed no income whatsoever," if "the 'Tiffany[]' doing business in Florida[] and the Tiffany herein[] were one and the same," "I would be faced with an obvious failure to report income" (*ibid.*). Upon inquiry, petitioners' attorney refused to confirm or deny that Tiffany Fine Arts sold lithographs (*ibid.*). Lewis accordingly included a request for lithograph information "out of an abundance of caution" (*ibid.*).

tion, one purpose of which [was] to ascertain the correctness of [petitioners'] consolidated corporate income tax returns" (J.A. 21a). Lewis was concerned about questionable business deductions and a "possible underreporting of income" by petitioners (J.A. 22a), an underreporting that he suspected might be traceable to an omission from income of "certain recourse and non-recourse notes provided by [Pedi-Pulsor] licensees" (J.A. 23a-24a). To verify the accuracy of petitioners' returns, Lewis continued, he had to identify petitioners' customers, examine the licensing agreements signed by the customers, and "match the income reflected by those agreements to the income reported" by petitioners (J.A. 24a). Lewis acknowledged the possibility that the IRS, after examining the summoned information, might make "further inquiry * * * into whether [the licensees] ha[d] correctly reported their income tax liabilities" (*ibid.*). For their part, petitioners responded by asserting their belief that "[t]he Service's true motive herein is to ascertain and audit the tax returns of [petitioners'] clients" (J.A. 18a).[6]

[6] Petitioners based their assertion on Lewis's earlier request for the names of "Pedi-Pulsor" licensees (see note 5, *supra*), on the Service's rejection of petitioners' offer of redacted financial information, and on the government's request for information about lithograph sales (see note 5, *supra*). J.A. 17a-18a. While petitioners also declared that they had offered the IRS an opportunity to verify their records by providing the identities of randomly selected licensees (J.A. 17a)—an assertion that is repeated before this Court (Pet. Br. 6)—Lewis affirmed that such an offer was not made, and explained that it would in any event have been unsatisfactory (J.A. 24a). Petitioners at no time asserted that the requested information was irrelvant to the Service's inquiry into their tax liability.

The district court ordered the summonses enforced, concluding that the Service had made "a sufficient showing * * * that the government's interests or the Internal Revenue Service's interest is in an audit of the consolidated returns of these companies" (J.A. 37a). The court added that an evidentiary hearing need not be held to explore petitioners' "hypothesis" of improper IRS motivation in light of the "clear factual statement" made by the government about its purposes (*ibid.*). It thus rejected petitioners' argument (see J.A. 29a-33a) that the Service was required to comply with Section 7609(f).

The court of appeals unanimously affirmed. It held that the "John Doe" rules of Section 7609(f) have no application where, as here, the IRS issues a summons to a named taxpayer in aid of a bona fide investigation of that person's tax liability. The court deemed irrelevant the possibility that records thus summoned might prove useful in auditing other, unnamed taxpayers, citing the absence of any indication that Congress intended Section 7609(f) to apply in such situations (Pet. App. A10), and noting the "formidable line" of this Court's holdings "establish[ing] that the summons power of the IRS should be construed broadly" (*ibid.*, citing cases). The court of appeals also observed that petitioners' approach "could easily destroy the delicate balance struck by § 7609(f)" by shouldering the IRS "with significantly greater administrative burdens than Congress intended" (Pet. App. A11). In so ruling, the Second Circuit followed the reasoning of the Eighth and Eleventh Circuits in *United States* v. *Barter Systems, Inc.*, 694 F.2d 163 (8th Cir. 1982), and *United States* v. *Gottlieb*, 712 F.2d 1363 (11th Cir. 1983), and rejected as unpersuasive the contrary holding of the Sixth Circuit in *United States* v. *Thompson*, 701 F.2d 1175 (1983). Finally, the court of appeals held that the district court properly refused to conduct an evidentiary hearing before ordering the summonses enforced, explaining that "the affidavits by agent Lewis established an ongoing IRS investigation of Tiffany sufficient to support the summonses issued here without compliance with the John Doe provisions of § 7609(f)" (Pet. App. A12).

SUMMARY OF ARGUMENT

1. Section 7609(f), which establishes the procedure for issuance of John Doe summonses, by its terms applies only to a summons that does not "identify the person with respect to whose liability [it] is issued." The summonses here, however, were issued "[i]n the matter of the tax liability" of petitioners, in furtherance of what both courts below found to be a legitimate investigation of petitioners' tax liabilities. Since petitioners properly were identified as the persons "with respect to whose liability" the summonses were issued, Section 7609(f) is inapplicable on its face.

Any ambiguity in the language of the provision is resolved by looking to the "mode of construction [that] has consistently been applied by this Court in construing the breadth of the [IRS] summons authority" (*United States* v. *Euge*, 444 U.S. 707, 715 (1980)): the Court has directed that "restrictions upon IRS summons power should be avoided 'absent unambiguous directions from Congress'" (*Arthur Young & Co.*, No. 82-687 (Mar. 21, 1984), slip op. 10, quoting *United States* v. *Bisceglia*, 420 U.S. 141, 150 (1975)). Thus the Court has declined to read other Code provisions as limiting Section 7602, and has restricted the authority of the district courts to

restrain the Service from issuing summonses. The same approach should be followed here, because Section 7609(f) provides no "direction"—unambiguous or otherwise—that it applies when the summoned information may be relevant to taxpayers in addition to the named one "with respect to whose liability the summons is issued."

2. When considering the scope of Section 7609(f) Congress plainly had in mind summonses issued to third parties that were not themselves under investigation. Both committee reports and the only congressional testimony relating to Section 7609(f) cited as examples of John Doe summonses only cases involving disinterested third party recordkeepers; nowhere in the legislative history is there a statement about, or an illustration of, a John Doe summons being issued to a taxpayer who was himself under investigation.

As this background suggests, Section 7609(f) was enacted in response to possibilities of abuse that simply are not present in cases such as this one, where the summoned parties are themselves under investigation. Congress did not intend Section 7609(f) to create enforceable "privacy rights" or make it more difficult for the IRS to obtain relevant information. Instead, Congress was concerned that if the Service could issue summonses at will to disinterested parties that had no stake in the underlying investigation and no incentive to contest enforcement, there would be nothing to restrain the IRS from "engag[ing] in * * * possible 'fishing expedition[s].'" H.R. Rep. 94-658, 94th Cong., 1st Sess. 311 (1975). Because in a John Doe situation there are no identifiable taxpayers to contest enforcement, Congress in Section 7609(f) required the IRS to have "specific facts

concerning a specific situation to present to the court" before a summons issued (H.R. Rep. 94-658, *supra*, at 311). When the summoned party is itself under investigation, however, there is no need to use Section 7609(f) to prevent "fishing expeditions" of the sort feared by the drafters of the John Doe provisions. In these circumstances the self-interest of the summoned party—and its established right to resist enforcement—were relied on by Congress to prevent the Service from striking out arbitrarily or from seeking irrelevant materials. Indeed, the petitioners in this case unsuccessfully contended in the district court that the Service's investigation of them was a pretext.

3. Applying Section 7609(f) whenever a summons requests information bearing on unidentified third parties would significantly impede "the effective exercise of the Service's enforcement responsibilities" (*Euge*, 444 U.S. at 711). Because virtually every IRS summons is likely to reveal information about parties with whom the taxpayer has dealt, petitioners' approach would require the Service to bring, and the courts to entertain, a vast number of unnecessary John Doe proceedings. Further, if the Service were unable to satisfy the requirements of Section 7609(f) as to the third parties, applying the John Doe rules would render the summons unenforceable, and thereby frustrate successful completion of the Service's investigation of *identified* taxpayers.

The Sixth Circuit's attempt to limit its holding by making application of the John Doe rules turn on the intent of the agent issuing the summons—so that Section 7609(f) would be called into play only when an "intent to investigate unknown third parties" is

"a motivating factor in the issuance of the summons" (*Thompson*, 701 F.2d at 1180-1181)—creates a system that is both unmanageable and disruptive of the Service's enforcement authority. Attempting to divine the subjective intent of individual agents would unduly delay "enforcement proceedings while the parties clash over, and judges grapple with, the thought processes of each investigator." *United States* v. *LaSalle National Bank*, 437 U.S. 298, 316 (1978).

4. Even if it is assumed that the IRS in issuing the summonses was motivated by the dual purposes of investigating both petitioners and their licensees, that assumption would not bring Section 7609(f) into play. Nothing in that provision addresses the Service's authority to issue Section 7602 summonses to an identified taxpayer if those summonses are aimed at determining the taxpayer's liability. A summons issued under Section 7602 is enforceable so long as *one* of its purposes is authorized by the provision. *United States* v. *LaSalle National Bank*, *supra*. Failure to apply this "dual purpose" rule here would ignore the role of Section 7602 as the "centerpiece" of the congressional scheme granting the IRS "expansive information-gathering authority" (*Arthur Young & Co.*, slip op. 9).

ARGUMENT

THE JOHN DOE PROVISIONS OF SECTION 7609(f) ARE INAPPLICABLE TO IRS SUMMONSES THAT ARE ISSUED TO NAMED TAXPAYERS WHO ARE THEMSELVES UNDER INVESTIGATION

Both courts below found that the summonses in this case were properly issued and sought information relevant to a bona fide investigation of petitioners' tax liability.[7] Summonses of this type, those courts concluded, are enforceable under Section 7602 without reference to Section 7609(f). Petitioners, however, note that the summonses will prove useful not only in auditing them, but also in identifying their customers and licensees. In such circumstances, petitioners maintain, it is irrelevant that the summonses were issued to further an investigation of named taxpayers who currently are under audit; instead, petitioners insist that attention should be focused only on the likelihood that enforcement of the summonses will turn up information about unidentified parties. Whenever a summons seeks such information, they contend, it cannot be served until

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[7] A large portion of petitioners' brief is devoted to making the factual argument that the Service was not conducting a bona fide investigation of petitioners' tax liability, and that the summonses in question were issued solely to obtain information about petitioners' clients (Pet. Br. 5, 7, 8, 9, 11-14, 33, 37-38). In making these assertions petitioners rely on affidavits that were presented to and considered by the district court and the court of appeals. Those courts concluded, on the basis of all the evidence, that the summonses were issued in furtherance of a legitimate investigation into petitioners' tax liability. This Court should not entertain petitioners' attempt to relitigate the facts.

the Service has completed a Section 7609(f) proceeding.[8]

Petitioners' view has been adopted by the Sixth Circuit. But it has been flatly rejected by unanimous panels of the Eighth, Eleventh, and now the Second Circuits. These courts have reasoned that the language and legislative history of Section 7609(f), as well as the congressional policies served by the summons provisions of the Code, compel the conclusion that the John Doe rules do not apply when a summons is issued to a named taxpayer whose tax liability is under investigation—even if the requested material may reveal information about other, unnamed individuals. In reaching this conclusion these courts of appeals have correctly followed this Court's

[8] Perhaps because they devote so much attention to their factual arguments (see note 7, *supra*), petitioners never clearly describe the circumstances in which they would apply Section 7609(f). At one point, they suggest that a John Doe proceeding must be used *whenever* a summons will disclose information about unidentified parties. See Pet. Br. 30 (suggesting that the IRS should have attempted to complete its audit of petitioners using only materials that did not reveal the identities of petitioners' clients; if the Service then determined that the audit could not be concluded without the names of the clients, the Service at that point could "seek an order to produce such records in accordance with section 7609(f)"). Elsewhere, however, petitioners indicate that Section 7609(f) is called into play only when a summons is issued at least in part for the *purpose* of obtaining information about unidentified parties. See Pet. Br. 32-33 (implying that the John Doe rules would not apply had the Service sought the names of petitioners' clients solely for the purpose of auditing petitioners); Pet. Br. 15, 31 (suggesting that the John Doe rules must be applied because at least one of the Service's purposes was the investigation of petitioners' clients). Either way, however, petitioners' approach is misguided.

admonition that the IRS summons authority "should be upheld absent express statutory prohibition or substantial countervailing policies." *United States* v. *Euge*, 444 U.S. 707, 711 (1980). No such prohibition or policies can be found in the language or background of Section 7609(f).

A. Section 7609(f) Cannot Properly Be Read To Apply To Summonses That Are Issued To Named Taxpayers Who Are Under Investigation, Even Though The Requested Information Also Will Be Relevant To The Tax Liability Of Other Taxpayers

Section 7609(f) by its terms applies only if a summons "does not identify the person with respect to whose liability [it] is issued." That simply is not the case here. The summonses enforced by the district court explicitly were issued "[i]n the matter of the tax liability of Tiffany Fine Arts Inc. & Subsidiaries" (J.A. 4a-7a). Both courts below found that the summonses furthered a legitimate, ongoing investigation into petitioners' tax liability (J.A. 37a; Pet. App. A12).[9] Those courts also concluded—indeed, petitioners never have denied—that the requested information is relevant to the Service's audit

[9] Those courts did not resolve the factual question whether one of Lewis's motives in issuing the summonses was an interest in obtaining the names of petitioners' licensees. The district court found only that the "Service's interest is in an audit of the consolidated returns of" petitioners (J.A. 37a). The court of appeals declined to address the question because "even assuming that the summonses in this case were issued to [petitioners] partly for the purpose of investigating [petitioners'] customers, the existence of that purpose—regardless of how it is characterized—does not invalidate the summonses because the IRS is pursuing the civil tax liability of a named taxpayer, Tiffany" (Pet. App. A12).

of petitioners (see note 6, *supra*). Since petitioners were "identified" legitimately (see *United States* v. *Powell*, 379 U.S. 48, 57-58 (1964)) as the persons "with respect to whose liability" the summonses were issued, Section 7609(f) is inapplicable on its face. Correspondingly, the summonses are properly enforceable under Section 7602.

Even if some ambiguity in the language of Section 7609(f) is assumed,[10] the reading given the provision by the Second Circuit is compelled by looking to the "mode of construction [that] has consistently been applied by this Court in construing the breadth of the [IRS] summons authority" (*Euge*, 444 U.S. at 715): the Court has repeatedly held that "restrictions upon IRS summons power should be avoided 'absent unambiguous directions from Congress.'" *United States* v. *Arthur Young & Co.*, No. 82-687 (Mar. 21, 1984), slip op. 10, quoting *United States* v. *Bisceglia*, 420 U.S. 141, 150 (1975). The Court, accordingly, has upheld broad applications of the Service's summons authority (*e.g.*, *Euge*, 444 U.S. at 714-716; *Bisceglia*, 420 U.S. at 150) and rejected attempts to impose implicit limitations on that authority (*e.g.*, *Arthur Young & Co.*, slip op. 9-15; *Donaldson* v. *United States*, 400 U.S. 517 (1971)). And, specifically, in *United States* v. *Powell*, *supra*, the Court—like the Second Circuit in this case—declined to read another provision of the Code, which concededly was designed to "curb * * * the investigating powers of low-echelon

[10] The Sixth Circuit, for example, read the statute differently, concluding that if a summons issued to a taxpayer under investigation also would produce information about unidentified individuals, both the taxpayer and those individuals are "person[s] with respect to whose liability the summons is issued" (*Thompson*, 701 F.2d at 1179). Petitioners read Section 7609(f) similarly (Pet. Br. 15-16).

revenue agents" (379 U.S. at 55), as narrowing the Service's Section 7602(a) summons authority.[11] Although the Court acknowledged that the more restrictive reading was plausible, it "reject[ed] such an interpretation because it might seriously hamper the Commissioner in carrying out investigations he thinks warranted" (379 U.S. at 53-54). So here, Section 7609(f) should not be interpreted to impose any restriction on the Service's broad summons authority beyond the restriction explicitly and unambiguously stated in that provision.

In sum, the Court has interpreted IRS summons authority against the backdrop of "a congressional policy choice *in favor of disclosure* of all information relevant to a legitimate IRS inquiry" (*Arthur Young & Co.*, slip op. 10 (emphasis in original)). As a result, the Court consistently has explained that the plain and often spare language of the Code should not be read as restricting the Service's power to issue summonses "absent [an] express statutory prohibition" (*Euge*, 444 U.S. at 711). Yet here there is no such explicit limitation in the statute: nothing in Section 7609 suggests that it applies when the summoned information will be relevant to taxpayers in addition to the one "with respect to whose liability the summons is issued." See *Gottlieb*, 712 F.2d at 1368; *Barter Systems, Inc.*, 694 F.2d at 168.

[11] In *Powell*, the summoned party contended that Section 7605(b) of the Code, which provides that "[n]o taxpayer shall be subjected to unnecessary examination," prevented the IRS from requesting the taxpayer's papers under Section 7602 without first showing some ground for believing that the taxpayer had committed fraud (since the statute of limitations barred the IRS from assessing deficiencies for the years under examination except in cases of fraud) (379 U.S. at 49).

B. The Legislative History Of Section 7609(f) Indicates That The John Doe Rules Do Not Apply When The Summoned Taxpayer Is Under Investigation

1. Section 7609 establishes the procedures used in connection with so-called "third party" summonses. Its first portion provides that, when a summons is issued to a "third party recordkeeper" [12] requesting information about a *named* taxpayer, and the recordkeeper is not itself under investigation, the named taxpayer must be given notice of and an opportunity to contest the summons.[13] § 7609(a) and (b). This provision grew out of congressional concerns that a recordkeeper who was not himself under investigation would have an "interest * * * in protecting the privacy of the records in question [that is] frequently far less intense than that of the person to whom the records pertain." S. Rep. 94-938, 94th Cong., 2d Sess. 368-369 (1976). See *United States* v. *Pittsburgh Trade Exchange, Inc.*, 644 F.2d 302, 305 (3d Cir. 1981). Involvement of the affected taxpayer, it was believed, would prevent the Service from using summonses to seek irrelevant material, or from otherwise disregarding the requirements of *United States* v. *Powell*, *supra*. See S. Rep. 94-938, *supra*, at 370.

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[12] Not all "disinterested" summoned parties fall within this category. Section 7609(a)(3) defines the term "third-party recordkeeper" to mean a bank or similar financial institution, consumer reporting agency, person who extends credit through "credit cards or similar devices," broker, attorney, or accountant. In 1982 barter exchanges were added to the list by the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324 *et seq.*

[13] In *Donaldson* v. *United States*, 400 U.S. 517, 530 (1971), the Court had held that a taxpayer in such a situation did not have a right to intervene in a proceeding to quash the summons.

Section 7609(f), which was enacted at the same time as the third party notice provision, was designed to address an analogous issue raised by this Court's decision in *Bisceglia*. In that case the Court held that the IRS had authority to issue John Doe summonses, even when the Service's investigation had not focused "upon a particular return, a particular named person, or a particular potential tax liability" (420 U.S. at 149).[14] Congress subsequently determined to adopt a procedure to forestall the possibility that John Doe summonses might be issued indiscriminately. Because the taxpayer affected by a John Doe summons is by definition unknown, in the John Doe context Congress substituted for Section 7609(a)'s notice provision the requirement, enacted in Section 7609(f), that issuance of the summons be approved by a district court. See H.R. Rep. 94-658, 94th Cong., 1st Sess. 307 (1975); *United States* v. *Samuels, Kramer & Co.*, 712 F.2d 1342, 1346 (9th Cir. 1983); *Gottlieb*, 712 F.2d at 1366 n.8. The congressional expectation was that such proceedings would prevent John Doe summonses from being used without restraint (H.R. Rep. 94-658, *supra*, at 307). In effect, the court was to be substituted in the John Doe context for the restraining influence exercised by participation of the affected taxpayer in the Section 7609(a) and (b) context.

2. Accordingly, when considering the scope of Section 7609(f), Congress plainly had in mind only summonses issued to third parties who were *not* themselves under investigation. Both Committee reports

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[14] In *Bisceglia* the summons in question was issued to a bank to determine the identity of an individual who had deposited $20,000 in deteriorated $100 bills (420 U.S. at 143).

cited as examples of "John Doe" summonses affected by Section 7609(f) only the summons in *Bisceglia*—which was issued to a bank for the purpose of investigating one of its depositors (see 420 U.S. at 143)—and several other cases involving disinterested third party recordkeepers. H.R. Rep. 94-658, *supra*, at 310-311; S. Rep. 94-938, *supra*, at 372. Moreover, the only congressional testimony in favor of the John Doe provisions was submitted on behalf of the American Banker's Association, which was concerned with the disclosure of bank records. *Tax Reform (Administration and Public Witnesses): Hearings Before the House Comm. on Ways and Means*, 94th Cong., 1st Sess. 364, 375-379 (1975) (testimony and statement of William M. Horne, Jr., Chairman of the American Banker's Association Committee on Taxation). In contrast, nowhere in the legislative history of Section 7609(f) is there a statement about, or an illustration of, a "John Doe" summons being issued to a taxpayer who was himself under investigation.[15]

[15] Amici First Western Government Securities, Inc. and Samuels, Kramer & Co. are mistaken in their assertion (Amici Br. 12) that one of the examples of a John Doe summons provided in the House Report (H.R. Rep. 94-658, *supra*, at 312) was a summons issued to a taxpayer that was itself under investigation. The summons referred to in the example was issued "to obtain the names of corporate shareholders involved in a taxable reorganization which had been characterized by the corporation (in a letter to its shareholders) as a nontaxable transaction." *Id.* at 311. The only reported case to which that example could have referred involved summonses issued to bank officials to learn the names of shareholders for whom the bank held shares as custodian, nominee or trustee. Thus the summonses were issued not to the corporation but to third party bank officials for the sole purpose of determining the tax liabilities of unidentified shareholders. *United States* v. *Armour*, 376 F. Supp. 318 (D. Conn. 1974). Indeed, the transactions involved tax liabilities only of the shareholders, not of the corporation. *Chapman* v. *Commissioner*, 618 F.2d 856 (1st Cir. 1980); *Heverly* v. *Commissioner*, 621 F.2d 1227 (3d Cir. 1980).

See *Gottlieb*, 712 F.2d at 1367 (canvassing legislative history); *Barter Systems, Inc.*, 694 F.2d at 168-169 & n.13 (same). Indeed, prior to the enactment of Section 7609(f) it appears that all of the reported "John Doe" cases involved summonses that had been issued to third parties whose own tax status was not under investigation.[16]

3. As this background suggests, the "third party" rules in general, and Section 7609(f) in particular, were enacted in response to possibilities of abuse that simply are not present in cases such as this one, where the summoned parties are themselves under investigation. Congress was concerned that if the Service could issue summonses at will to disinterested parties that had no stake in the underlying investigation and no incentive to contest enforcement, there would be nothing to restrain the IRS from "engag[ing] in * * * possible 'fishing expedition[s].'" H.R. Rep. 94-658, *supra*, at 311; S. Rep. 94-938,

[16] These cases included *United States* v. *Carter*, 489 F.2d 413 (5th Cir. 1973); *United States* v. *Humble Oil & Refining Co.*, 488 F.2d 953 (5th Cir. 1974), vacated and remanded for reconsideration in light of *United States* v. *Bisceglia*, 420 U.S. 141 (1975), 421 U.S. 943 (1975), on remand, 518 F.2d 747 (5th Cir. 1975); *United States* v. *Berkowitz*, 488 F.2d 1235 (3d Cir. 1973); *United States* v. *Turner*, 480 F.2d 272 (7th Cir. 1973); *United States* v. *Theodore*, 479 F.2d 749 (4th Cir. 1973); *Schulze* v. *Rayunec*, 350 F.2d 666 (7th Cir.), cert. denied, 382 U.S. 919 (1965); *Tillotson* v. *Boughner*, 350 F.2d 663 (7th Cir. 1965); *United States* v. *Armour*, 376 F. Supp. 318 (D. Conn. 1974); *United States* v. *Conrad*, 36 A.F.T.R.2d (P-H) ¶ 75-5247 (W.D. Pa. 1975).

supra, at 373. It therefore enacted Section 7609(a) to grant identifiable taxpayers who are affected by a third party summons the right to contest enforcement under the traditional *Powell* criteria, so long as the summoned party is disinterested; significantly, as even petitioners seem to acknowledge (Pet. Br. 16 n.2), notice to other affected taxpayers need *not* be given when the summoned recordkeeper is itself "the person with respect to whose liability the summons is issued" (§ 7609(a)(4)(A)).[17] And to prevent "fishing expeditions" in the John Doe situation, where there are no identifiable taxpayers to keep the Service in bounds, Congress in Section 7609(f) required the IRS to "have specific facts concerning a specific situation to present to the court" before a summons issued. H.R. Rep. 94-658, *supra*, at 311; S. Rep. 94-938, *supra*, at 373.

In enacting Section 7609, then, Congress was not concerned with creating privacy rights against proper investigation into compliance with the tax laws.[18] Indeed, Congress made it quite plain that the

[17] This is true even when the summons requests materials that plainly will shed light on the activities of unnamed parties. See *Abraham* v. *United States*, No. 84-6101 (2d Cir. July 18, 1984), aff'g 582 F. Supp. 257 (S.D.N.Y. 1984) (parties citing Section 7609(a) were denied a right to notice and permission to intervene in an enforcement proceeding—even though the summons sought their stock trading records—because the tax liability of the party on whom the summons was served itself was under investigation).

[18] Petitioners repeatedly assert that the John Doe procedures were meant to protect the personal privacy interests of the parties to whom the requested records pertain (Pet. Br. 19-21, 22). But this plainly is not the case. Unidentified individuals with respect to whom records are sought under Section 7609(f) have no right or opportunity to participate in John Doe court

provision was not intended to create new substantive rights or make it more difficult for the IRS to obtain relevant evidence. See S. Rep. 94-938, *supra*, at 370. And Congress never expressed an intent to keep pertinent material bearing on the investigation of an identified taxpayer out of the Service's hands simply because that material also might shed light on another party's tax situation. Rather, Section 7609(f) was designed as a procedural restraint against generalized or random IRS "fishing expeditions" (see *Samuels, Kramer & Co.*, 712 F.2d at 1346, quoting *In re Tax Liabilities of John Does*, 688 F.2d 144, 149 (2d Cir. 1982)).

When the summoned party is itself under investigation there is no need to use Section 7609(f) to

proceedings, since such proceedings by statute must be conducted ex parte (Section 7609(h)(2)). Indeed, the Code grants such individuals no right to intervene even in the usual enforcement proceedings conducted under Section 7604. See *Donaldson*, 400 U.S. at 527-530. Cf. *Abraham* v. *United States*, No. 84-6101 (2d Cir. July 18, 1984). Here, for example, if petitioners' licensees or customers know about the summonses at issue—which seems highly likely—they have no right to contest the validity of those summonses, whether or not the John Doe rules are found to apply. Had Congress meant to create a personal privacy right, it surely would have drawn the right in such a way that it could be asserted by the individual whose privacy is at stake. It is plain, however, that Congress was not concerned with protecting "privacy" as such; as the Eleventh Circuit observed in *Gottlieb*, the records held by persons such as petitioners may be freely available to a variety of government agencies and may be freely given by petitioners to other private parties (712 F.2d at 1369). Instead, Congress's intent was the narrow, specific one of forestalling IRS "fishing expeditions," to be accomplished by requiring that the Service have reason to seek materials before requesting them.

forestall the Service from embarking on such "expeditions," even if the requested material will reveal information about other parties. In such circumstances the vigilance and self-interest of the summoned party—complemented by its right to resist enforcement (see *Powell*, 379 U.S. at 58; *Euge*, 444 U.S. at 719)—will prevent the Service from striking out arbitrarily or from seeking irrelevant materials.[19] The affected taxpayer will fully be able and motivated to contest the summons on any of the grounds set out in *Powell* and *Euge*. See *Gottlieb*, 712 F.2d at 1369-1370. Indeed, that is precisely what petitioners did in this case when they argued to the district court that the Service's investigation of them was a pretense; the same path, of course, was followed by the summoned parties in *Gottlieb* and *Barter Systems, Inc.* To obtain enforcement of these sum-

[19] Amici First Western Government Securities, Inc. and Samuels, Kramer & Co. insist that a summoned party cannot adequately defend the interests of absent taxpayers because such a party will not be able to assert those taxpayers' "personal defenses," such as the attorney-client or Fifth Amendment privileges (Amici Br. 14). But an ex parte John Doe proceeding also will not take such defenses into account; the individual whose records are requested has no right to participate in—and may not be aware of—the proceeding. Indeed, the Code establishes that notice and an opportunity to intervene need not be given even to named parties whose records are requested when the taxpayer who receives the summons itself is under investigation (§ 7609(a)(4)); since the John Doe rules were adopted for basically the same purpose and as an alternative to the notice provisions of Section 7609(a) (see H.R. Rep. 94-658, *supra*, at 307; *Samuels, Kramer & Co.*, 712 F.2d at 1346; *Pittsburgh Trade Exchange*, 644 F.2d at 305; *Gottlieb*, 712 F.2d at 1366 n.8), they similarly do not apply when the taxpayer who receives the summons is under investigation.

monses, the IRS had to establish that it was engaging in a legitimate tax investigation by showing that the information sought may be relevant to the summoned party's tax liability. The Service in fact made just such a showing in this case, in an adversary proceeding. That showing satisfied the interests that would otherwise be protected by the ex parte procedure of Section 7609(f).

Thus, the personal stake of the summoned taxpayer provides the type of institutional restraint on the IRS that is offered by the John Doe rules when the party receiving the summons has no interest in the investigation. This is true whether or not the summons was issued in part for the purpose of obtaining information about unidentified parties. Where, as here, the taxpayer under investigation can contest the legitimacy of the Service's investigation, the possibility of abuse addressed by Section 7609(f) does not exist; requiring the IRS to go through a John Doe court proceeding therefore would not advance any congressionally endorsed purpose and would needlessly burden the courts. Because Section 7609(f) does not confer any enforceable personal rights upon unnamed taxpayers, holding a John Doe hearing also would not serve any legitimate interests of petitioners' licensees. In short, where the summoned party has a sufficient reason to defend against the summons because its own liability is at stake, the interest Congress sought to protect has been fully satisfied.

C. Application Of The John Doe Rules To Cases In Which The Summoned Taxpayer Is Under Investigation Would Be Unmanageable And Would Seriously Impede Enforcement Of The Revenue Laws

We have shown that application of Section 7609(f) to cases such as this one would not comport with the statutory language or with Congress's intent in enacting the statute. It also would seriously detract from the "expansive information-gathering authority" that Congress has granted the IRS (*Arthur Young & Co.*, slip op. 9), thus significantly impeding "the effective exercise of the Service's enforcement responsibilities" (*Euge*, 444 U.S. at 711).

1. As the court below noted (Pet. App. A11), virtually every IRS summons is likely to reveal information about parties with whom the taxpayer has dealt, and thus to some degree to facilitate the identification and investigation of unnamed taxpayers—often in ways that the Service would not have anticipated, given the complexity of modern economic relationships. Adopting petitioners' suggestion that the John Doe rules apply whenever enforcement of the summons will reveal information about unnamed third parties therefore would mean that virtually anyone who receives a summons under Section 7602 could demand that the IRS satisfy the requirements of Section 7609(f). At the least, this would subject the Service to far greater administrative and enforcement burdens than Congress could possibly have intended, a consequence that "would unwarrantedly cast doubt upon and stultify the Service's every investigative move" (*Donaldson*, 400 U.S. at 531). At the same time, it would impose significant additional burdens on the district courts that would be forced to consider the Service's petitions, burdens that would be

compounded by the requirement that in most cases summons enforcement proceedings be moved to the top of the docket. § 7609(h)(3).

Moreover, applying the John Doe rules in cases such as this one could seriously undermine the ability of the IRS to conduct audits of many *identified* taxpayers. If the Service were unable to satisfy the requirements of Section 7609(f) as to unnamed taxpayers such as petitioners' licensees, under petitioners' scheme summonses such as the ones in this case would be unenforceable. Yet audits of taxpayers in petitioners' situation could not meaningfully be conducted without access to non-redacted versions of materials such as those requested from petitioners.[20]

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[20] Petitioners repeatedly assert that the Service does not need the materials requested by the summonses to conduct an audit of petitioners' tax liability (Pet. Br. 6, 27, 32-33). But it obviously is not the role of a taxpayer under audit to determine what materials may be relevant; Section 7602 commits that determination to the Service and the courts. Here, both courts below agreed with the Service's conclusion that the requested material would further the ongoing audit. That judgment plainly was correct. The summoned records—ledgers, journals, checks and bank statements, contracts, and invoices—are the normal records considered necessary for the audit of any taxpayer's return, and are the very records from which a list of the names of petitioners' clients most likely would be compiled. It would not be sufficient to accept redacted versions of those records that excluded the names of the clients, for without the names it would be virtually impossible to trace transactions from source documents to books of account (see J.A. 24a), or reconcile reported income with deposits and receivables. Moreover, contacts with some of the clients might well be necessary to verify that the transactions reported by petitioners actually occurred. An audit is not, as petitioners imply (Pet. Br. 31-33), merely a mathematical exercise to test the correctness of the computations made; it is an examination of the transactions that

See *Gottlieb*, 712 F.2d at 1368-1369; *Barter Systems, Inc.*, 694 F.2d at 169. The application of Section 7609(f) to cases such as this one therefore would be contrary to the Service's statutory mandate to "inquire after and concerning all persons * * * who may be liable to pay any internal revenue tax" (§ 7601), and improperly would "force the Service to choose either to forgo the use of congressionally authorized summonses or to abandon" the other investigations it seeks to undertake. *United States* v. *LaSalle National Bank*, 437 U.S. at 307. It also effectively would allow a summoned taxpayer to resist a summons on grounds not traditionally available (that is, the asserted "privacy" interests of unnamed taxpayers), contrary to Congress's explicit statement that Section 7609 was not intended to create any substantive rights. See S. Rep. 94-938, *supra*, at 370. See also pages 20-21, *supra*.

2. The Sixth Circuit—and possibly petitioners as well (see note 8, *supra*)—sought to limit the damage its ruling would wreak on the Service's enforcement powers by adding another element to its interpretation of Section 7609(f): *Thompson* makes application of the John Doe rules turn on the intent of the agent issuing the summons. Specifically, the Sixth Circuit held that Section 7609(f) is called into effect only when "a clear intent to investigate unknown third parties" is "a motivating factor in the issuance of the summons" (701 F.2d at 1180, 1181). This subjective approach, which has been rejected by both this Court and Congress in the summons context, is unworkable in practice and unsound in principle.

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are reflected in records and on a return to insure that the transactions have been correctly reported and characterized.

In *United States* v. *LaSalle National Bank*, *supra*, this Court sustained the validity of a "dual purpose" summons, ruling that a summons issued under Section 7602 is enforceable so long as the IRS in an institutional sense has not abandoned its purpose of civil tax determination, notwithstanding that the issuing agent's purpose is to investigate criminal conduct (437 U.S. at 318). In so ruling, the Court noted that attempts to tie the enforceability of a summons to the subjective intent of the issuing agent would be "undesirable and unrewarding," and would "frustrate the enforcement of the tax laws by restricting the use of the summons according to the motivation of a single agent without regard to the enforcement policy of the Service as an institution" (*id.* at 316). Accepting the relevance of such inquiries also would allow the summoned party to make allegations of impropriety in almost every case, thus "delay[ing] summons enforcement proceedings while the parties clash over, and judges grapple with, the thought processes of each investigator" (*ibid.*).[21]

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[21] This state of affairs would encourage summoned parties such as petitioners to delay an investigation by making insubstantial allegations of impropriety, with the hope that applicable statutes of limitations would run before the investigation could be completed. In this case, for example, the summonses requested information for the years 1979 and 1980. The three year statutes of limitations governing determinations of tax deficiencies for those years therefore expired on April 15, 1983 or April 15, 1984. As a result, absent fraud or substantial unreported income (Section 6501(c) and (e)(1)), there no longer exists any reason for the IRS to conduct audits of petitioners' clients for either of those years. The information requested by the summonses is, however, still necessary to complete the ongoing audit of petitioners, which have consented to extensions of the statutes of limitations as to their own tax liabilities.

After *LaSalle National Bank* was decided, Congress amended Section 7602 to permit the issuance of a summons to investigate both civil and criminal tax matters, so long as no "Justice Department referral is in effect." Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 333(a), 96 Stat. 622. Congress thus both endorsed and expanded upon this Court's upholding of "dual purpose" summonses in *LaSalle National Bank*, by rejecting inquiry into the Service's institutional motivation as well as the agent's subjective intent.

The Sixth Circuit's contrary approach in the present context ignores the realities of tax enforcement while doing little to limit the scope of its ruling. In some cases the audit of an identified taxpayer necessarily will involve the consideration of material relating to unidentified third parties.[22] And in many other instances where the liability of a taxpayer—such as the promoter of a tax shelter, for example—plainly warrants investigation, an investigating agent inevitably will realize that the clients or customers of that taxpayer may bear scrutiny as well.[23] Requiring

[22] An agent who is auditing a partnership or a small corporation that has elected to have its earnings taxed to its shareholders under Subchapter S of the Code, for example, must learn the identities of the partners or shareholders, since the earnings of the entity are reported on the personal returns of the partners or shareholders. See §§ 701, 702, 1363, 1366.

[23] Unaccountably, petitioners seem to suggest that, both in this case and as a general rule, the Service will wish to review the tax liability only of the customers or clients of a tax shelter (Pet. Br. 13). Obviously, however, the IRS will be at least as interested in reviewing the returns of the shelter and its promoters. Indeed, this is confirmed by the very authority cited by petitioners (*ibid.*, quoting [2 Audit] Internal Revenue Manual (CCH) § 42(17)2.3 (Dec. 9, 1980)).

a court to determine the extent to which such a belief "motivated" the agent to issue a summons would involve the drawing of delicate distinctions of little practical significance, and could well result in needless curtailment of the agent's ability to pursue an indisputably justified investigation of the identified taxpayer.

Petitioners nevertheless insist that without an intent test the IRS's summons power is "capable of easy abuse" (Pet. Br. 17), because the Service might use the audit of a recordkeeper as a pretext for obtaining information about third parties (Pet. Br. 21, 34-35). But this argument is entirely beside the point, because "specious" audits of recordkeepers (Pet. Br. 35) already may be contested under Section 7602 without reference to the John Doe rules. It has long been the law that a summons issued under Section 7602(a) is enforceable only if it seeks material that may be relevant to a legitimate IRS inquiry (see *Powell*, 379 U.S. at 57-58). Petitioners in fact argued in this case that the ordinary Section 7602(a) standards had not been met, and both courts below concluded that the Service's ongoing investigation of petitioners' own tax liability was legitimate and not a pretense.[24] It is thus neither necessary nor appropriate to distort the John Doe rules to prevent the abuse of Section 7602(a). See *Euge*, 444 U.S. at 719; *Bisceglia*, 420 U.S. at 146, 151.

[24] Petitioners' opportunity "to challenge the issuance of the summons[es] in an adversary proceeding in federal court" was "quite sufficient" to protect their interests (*Euge*, 444 U.S. at 719). It was well within the district court's discretion to conclude, after reviewing the submissions of the parties, that a further evidentiary hearing was unnecessary. See *United States* v. *Morgan Guaranty Trust Co.*, 572 F.2d 36, 42-43 n.9 (2d Cir.), cert. denied, 439 U.S. 822 (1978). Cf. *Donaldson*, 400 U.S. at 528-529.

D. So Long As One Of The Purposes Served By A Summons Is Authorized Under Section 7602(a), The Summons May Be Issued Under That Section

Even if it is assumed that the IRS in issuing the summonses was motivated by the dual purpose of investigating both petitioners and their licensees, that assumption would not bring Section 7609(f) into play. Nothing in that Section addresses the Service's indisputable authority to issue Section 7602(a) summonses to an identified taxpayer if those summonses are aimed at determining the taxpayer's liability. And while Section 7609(f) imposes a procedural limitation on the Section 7602(a) authority to obtain information about unnamed taxpayers, a formidable line of cases holds that "Section 7602 should not be read so narrowly so as to imply that an audit for a purpose authorized by it must be restricted solely to that purpose and may not be utilized as a good faith effort to obtain ancillary data. To do so would be to deny the intent of section 7601, i.e., to insure the general workability of the federal taxation system." *United States* v. *First National Bank*, 635 F.2d 391, 396 (5th Cir.), cert. denied, 452 U.S. 916 (1981). Indeed, it would run squarely counter to the role of Section 7602 as the "centerpiece" of a congressional scheme granting the IRS "expansive information-gathering authority" (*Arthur Young & Co.*, slip op. 9), to focus on the situation of the unnamed parties rather than on that of the taxpayer under investigation.

Accordingly, in *United States* v. *LaSalle National Bank*, *supra*, in sustaining the validity of a "dual purpose" summons, this Court explained that although the purpose being validly served by the summons issued under Section 7602 (obtaining information to advance a civil investigation) and the purpose being challenged as inappropriate under that provision (obtaining information to advance the investigation of criminal activity) were "necessarily" intertwined, a dual purpose summons must be found enforceable so long as the Service continues to pursue "the congressionally authorized purposes of § 7602" (437 U.S. at 318). In a variety of contexts, the courts of appeals have followed *LaSalle National Bank* by reading Section 7602 to permit the issuance of dual purpose summonses, so long as one of the purposes is authorized by the provision. *First National Bank*, 635 F.2d at 395-396 (enforcing summons issued to named taxpayer where IRS had purpose of developing data for Taxpayer Compliance Measurement Program); *United States* v. *Flagg*, 634 F.2d 1087, 1091-1092 (8th Cir. 1980) (same); *Pittsburgh Trade Exchange*, 644 F.2d at 307-308 (enforcing summons issued in part for purpose of obtaining research data). Indeed, no matter what other IRS purposes may be served by the summons, "the very language of § 7602 reflects * * * a congressional policy choice *in favor of disclosure* of all information relevant to a legitimate IRS inquiry" (*Arthur Young & Co.*, slip op. 10 (emphasis in original)).

It has never been the law that the Service may not use information legitimately secured by it in the course of investigating one taxpayer's liabilities to initiate or pursue an investigation of the liabilities of other taxpayers.[25] Much less should it be the law that the Service's investigation of the first taxpayer's liability should be frustrated or impeded because of the mere possibility—or even the likelihood—that the in-

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[25] Indeed, a joint investigation of the liabilities of a group of taxpayers, such as petitioners themselves, is commonplace.

formation sought will also shed light on the tax liabilities of other persons.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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STATUTORY APPENDIX

Internal Revenue Code 1954 (26 U.S.C.):

§ 7602 [as amended by Section 333(a), Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324]. Examination of books and witnesses

(a) *Authority to Summons, Etc.* For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

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§ 7604 [as amended by Section 1906(b)(13)(A), Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520] Enforcement of summons

(a) *Jurisdiction of district court* If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

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§ 7609 [as added by Section 1205(a), Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520]. Special procedures for third-party summonses

(a) *Notice*—

(1) *In general* If—

(A) any summons described in subsection (c) is served on any person who is a third-party recordkeeper, and

(B) the summons requires the production of any portion of records made or kept of the business transactions or affairs of any person (other than the person summoned) who is identified in

the description of the records contained in the summons,

then notice of the summons shall be given to any person so identified within 3 days of the day on which such service is made, but no later than the 23rd day before the day fixed in the summons as the day upon which such records are to be examined. Such notice shall be accompanied by a copy of the summons which has been served and shall contain an explanation of the right under subsection b(2) to bring a proceeding to quash the summons.

• • • • •

(b) *Right to intervene; right to proceeding to quash*

(1) *Intervention*

Notwithstanding any other law or rule of law, any person who is entitled to notice of a summons under subsection (a) shall have the right to intervene in any proceeding with respect to the enforcement of such summons under section 7604.

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(f) *Additional requirement in the case of a John Doe summons*

Any summons described in subsection (c) which does not identify the person with respect to whose liability the summons is issued may be served only after a court proceeding in which the Secretary establishes that—

(1) the summons relates to the investigation of a particular person or ascertainable group or class of persons,

(2) there is a reasonable basis for believing that such person or group or class of persons may fail or may have failed to comply with any provision of any internal revenue law, and

(3) the information sought to be obtained from the examination of the records (and the identity of the person or persons with respect to whose liability the summons is issued) is not available from other sources.

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(h) *Jurisdiction of district court; etc.*

(1) *Jurisdiction*

The United States district court for the district within which the person to be summoned resides or is found shall have jurisdiction to hear and determine any proceeding brought under subsection (b)(2), (f), or (g). An order denying the petition shall be deemed a final order which may be appealed.

(2) *Special rule for proceedings under subsections (f) and (g)*

The determinations required to be made under subsections (f) and (g) shall be made ex parte and shall be made solely on the petition and supporting affidavits.

(3) *Priority*

Except as to cases the court considers of greater importance, a proceeding brought

for the enforcement of any summons, or a proceeding under this section, and appeals, takes precedence on the docket over all other cases and shall be assigned for hearing at the earliest practicable date.

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